

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

BOBBY J. BARTON,

PETITIONER

APPELLATE CASE NO. 2013-000804

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Bobby J. Barton, Appellant.

Appellate Case No. 2010-169826

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2013-UP-058
Heard January 8, 2013 – Filed January 30, 2013

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of South
Carolina Commission on Indigent Defense, of Columbia,
for Appellant.

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Deputy Attorney General Donald J. Zelenka, and
Assistant Attorney General William M. Blicht, Jr., all of
Columbia; and Solicitor W. Walter Wilkins, of
Greenville, for Respondent.

PER CURIAM: Appellant Bobby Barton seeks review of his armed robbery conviction. Barton argues: (1) the trial court erred in declining to suppress the victim's identification of Barton because the out-of-court photographic lineup presented to the victim was unreliable; (2) the trial court's jury instruction on the accuracy of an eyewitness identification was incomplete; (3) the jury instruction on armed robbery placed undue emphasis on the phrase "representation of a weapon;" and (4) the trial court should have relieved Barton's attorney because she violated a confidence at the pre-trial hearing. We affirm.

1. As to Barton's motion to suppress the victim's identification, the trial court properly denied the motion. *See State v. Liverman*, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012) ("Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion."). Here, the trial court did not abuse its discretion in declining to suppress the identification and allowing the jury to assess the reliability of the identification because the photographic lineup was not unduly suggestive. *See id.* at 138, 727 S.E.2d at 426 (recognizing the two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification: (1) "whether the identification resulted from unnecessary and unduly suggestive *police procedures*," and (2) "if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed" (citing *Neil v. Biggers*, 409 U.S. 188, 198 (1972)) (emphasis added)); *State v. Cheeseboro*, 346 S.C. 526, 540, 552 S.E.2d 300, 307-08 (2001) ("An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977))).

Barton argues the photographic lineup was unreliable because the victim had prior exposure to the photograph of Barton that was used in the lineup. Specifically, Barton asserts that the victim's identification was tainted by his prior viewing of a privately published magazine displaying hundreds of mug shots taken in the Greenville area ("Mug Shot" magazine), including Barton's mug shot. However, there is nothing in the record to show that law enforcement was involved in the publication or distribution of the magazine or the victim's viewing of the magazine. The victim testified that there were no representatives of law enforcement with him when he viewed the magazine. Further, nothing in the record shows any design by

the officer conducting the photographic lineup to reinforce the victim's prior identification or even any awareness on the officer's part of the prior identification.

"The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012). In other words, the reliability of an eyewitness identification may be determined by the jury when there is no improper police conduct involved. *Id.* at 726 ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. . . . This deterrence rationale is inapposite in cases . . . in which the police engaged in no improper conduct." (citation omitted)); *see also State v. Tisdale*, 338 S.C. 607, 612, 527 S.E.2d 389, 392 (Ct. App. 2000) ("[T]he impetus behind the harsh remedy of exclusion is police deterrence. . . . Thus, we hold that the [*Neil v. Biggers*] analysis is inapplicable where there is a nongovernmental identification source.").

In determining the reliability of the victim's identification of Barton, the jury was allowed to consider the accuracy of the victim's initial description of the robber, the fact that the victim may have been inebriated at the time of the robbery, and the victim's prior viewing of "Mug Shot" magazine, all of which were highlighted during cross-examination of the victim and closing arguments. These circumstances did not require excluding the victim's identification of Barton from the jury's consideration because none of these circumstances were brought about by improper police conduct. *See Tisdale*, 338 S.C. at 613, 527 S.E.2d at 393 ("The extent to which a suggestion from nongovernment sources has influenced the memory or perception of the witness, or the ability of the witness to articulate or relate the identifying characteristics of the accused, is a proper issue for the trier of fact to determine.").

2. As to the trial court's jury instruction on the accuracy of an eyewitness identification, the instruction properly focused the jury's attention on the necessity to find that the identification testimony established Barton as the robber beyond a reasonable doubt. Therefore, no prejudice resulted to Barton from the trial court's failure to quote all of the language in Barton's requested instruction. *See State v. Patterson*, 337 S.C. 215, 234, 522 S.E.2d 845, 855 (Ct. App. 1999) (holding that no prejudice resulted from the trial court's failure to give the identification instruction requested by the defendant because the trial court's instruction

adequately focused the attention of the jury on the necessity for a finding that the testimony identified the defendant as the offender beyond a reasonable doubt). Further, Barton had ample opportunity, through cross-examination and closing arguments, to highlight the circumstances that may have affected the two eyewitness identifications. *See Perry*, 132 S. Ct. at 728-29 (noting systemic safeguards against juries placing undue weight on eyewitness testimony of questionable reliability).

3. As to the jury instruction on armed robbery, the trial court did not place undue emphasis on the phrase "representation of a weapon." *See* S.C. Code Ann. § 16-11-330(A) (2003) ("A person who commits robbery while armed with a . . . deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony . . ."). Rather, the trial court properly corrected its earlier omission of this phrase from its introduction to the definition of strong arm robbery: "If you find that the State has failed to prove that the Defendant was armed with a deadly weapon or with a representation of a deadly weapon after having alleged that he was armed, then you may consider whether . . . he is guilty of Strong Arm Robbery." *See State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

The State had a right to insist on this correction, given the victim's testimony that although he did not see the pocketknife that the robber held against his neck, he knew it was a knife because he felt it. *See State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) ("The evidence presented at trial determines the law to be charged to the jury."). Even if the object held against the victim's neck was not a knife or other deadly weapon, the robber's act of holding the object against the victim's neck was designed to give the victim the impression that the object could inflict death or great bodily harm. *See State v. Heck*, 304 S.C. 345, 346, 404 S.E.2d 514, 515 (Ct. App. 1991) ("A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm.").

4. As to the motion to relieve trial counsel, the trial court acted well within its discretion in denying the motion. *See State v. Justus*, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011) ("[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of

discretion." (citations omitted)); *State v. Childers*, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007) (holding that the movant bears the burden to show satisfactory cause for removal). Barton waited until the first day of trial to submit the motion to the trial court, and he did not express a willingness to represent himself. Further, counsel for the State indicated that he had independently gained the information Barton alleged to have been improperly revealed by his trial counsel. Therefore, even if this information was confidential in nature, Barton was not prejudiced by counsel's alleged revelation of the information prior to trial.

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BOBBY J. BARTON,

APPELLANT

APPELLATE CASE NO. 2010-169826

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

Opinion No. 2013-UP-058

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on January 30, 2013. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Barton argued four issues on appeal: (1) the trial court erred in denying Barton's motion to suppress the identification via the photo lineup when the lineup was not reliable because the alleged victim was inebriated at the time of the incident, and had seen Barton's photo in a "mug shot" magazine prior to the photo lineup; (2) the trial court erred in refusing to give Barton's complete

Request to Charge #7 on the accuracy of identification; (3) the trial court erred in giving the jury a second charge on armed robbery at the request of the state just to include the words "or representation of a weapon" when neither the victim nor the co-defendant witness saw the knife allegedly used; (4) the trial court erred in refusing to relieve Barton's trial attorney and appoint another attorney after Barton argued that his attorney breached his confidentiality by bringing to light at the preliminary hearing that the co-defendant witness, Patricia Rice, had lived with Barton previously.

The Court of Appeals affirmed the trial court on the four issues. On Issue One, the Court held that the trial court did not abuse its discretion in admitting the eyewitness identification because none of the circumstances affecting the reliability of the photo lineup were brought about by improper police conduct. On issue Two, the court held that Barton had ample opportunity to highlight the circumstances that may have affected the two eyewitness identifications so the trial court's instruction on the accuracy of the identifications, which did not include all of the language Barton requested, was not prejudicial to Barton. On issue Three, the Court held that the trial court did not place undue emphasis on the phrase "representation of a weapon." The Court wrote that even if the object held against the victim's neck was not knife, this act was designed to give the victim the impression that the object could inflict bodily harm. On Issue Four, the Court held that the trial court acted well within its discretion in denying Barton's motion to relieve trial counsel as Barton was not prejudiced by trial counsel's revelation of information prior to trial.

ISSUE ONE: On July 25, 2009, Edwin Perez was sitting behind his trailer in the trailer park where he lived with his brothers, but his brothers were inside at this time. He had been drinking beer since he got home from his landscaping job on that Friday. R. 32, ll. 18 – 25; R. 36, ll. 16 – 18; R. 70, ll. 4 – 11; R. 72, ll. 14 – 25; R. 73, ll. 1 – 25; R. 74, ll. 1 – 10. All of a sudden, a man and

woman appeared. The man allegedly pushed him down, and held a knife to his throat and took his wallet which contained \$500. Perez did not see the knife but felt it against his throat. R. 75, ll. 1 – 25; R. 76, ll. 1 – 25; R. 77, ll. 1 – 25. He had seen the woman before a few times when she took the path through the trailer park to another neighborhood. He had seen the man maybe twice. R. 78, ll. 1 – 25; R. 79, ll. 1 – 4.

He said it was dark outside as it happened around midnight. However, there were some lights at the entrance of the trailer. R. 35, ll. 21 – 25; R. 36, ll. 1 – 25; R. 92, ll. 3 – 8.

Perez called 911 but hung up because the police were speaking in English. The police could not understand him.¹ The police called back, and talked to his brother who spoke English. His brother interpreted for him. R. 41, ll. 15 – 25; R. 42, ll. 1 – 3; R. 82, l. 1 – 10; R. 79, ll. 5 – 25.

The description Perez gave to the police was that the robber was a black male in his mid-twenties to early thirties. R. 32, ll. 5 – 8; R. 108, ll. 3 – 25; R. 109, ll. 1 – 23. Perez admitted on cross examination during the Neil v. Biggers² pretrial hearing that he was not surprised that the officers described him as “grossly intoxicated” on the night of the incident. R. 42, ll. 8 – 17.

About a week after the incident, on August 3, 2009, Investigator Mike Jarvis of the Greenville County Sheriff's Office talked with Perez. They rode through the nearby neighborhoods and found the woman who was at the robbery. R. 123, ll. 20 – 25; R. 125, ll. 1 – 25; R. 126, ll. 1 – 25.

The woman was identified as Patricia Rice who had been in a romantic relationship with Barton off and on for ten years. R. 127, ll. 1 – 25; R. 128, ll. 1-2; R. 110, ll. 18 – 25; R. 112, ll. 8 – 23. Rice told the investigators that she was present when the robbery occurred. R. 115, ll. 1 – 25.

¹ Perez did not speak English and required an interpreter during the trial to translate. R. 32, ll. 18 – 20.

² Neil v. Biggers, 409 U.S. 188 (1972).

Rice was arrested and charged with this robbery. The charges against her were later dismissed. R. 111, ll. 1 – 12. Rice told the investigators on August 3, 2009, that Barton committed this robbery of Perez on July 25, 2009. R. 115, ll. 14 – 25; R. 117, ll. 1 – 25; R. 128, ll. 1 – 20. Barton was arrested the next day on August 4, 2009. R. 128, ll. 21 – 25; R. 129, ll. 1 – 3.

About two weeks after Barton was arrested, Perez found a “mug shot” magazine which contained hundreds of pictures of people who had been arrested. He looked through the magazine and saw Barton’s mug shot. R. 88, ll. 1 – 25; R. 89, ll. 1 – 25; R. 90, ll. 1 – 6. Barton and Rice were the only mug shots for armed robberies in the magazine. R. 106, ll. 2 – 25; R. 107, ll. 1 – 3. Perez did not call the police and tell them of the mug shot. R. 96, ll. 16 – 25; R. 97, ll. 1 – 12; R. 98, ll. 15 – 20.

On January 8, 2010, about five months after the robbery, Investigator Tracy King called Perez to come into the sheriff’s office and view a photo line up. Six photos were included with Barton in the lower center of the six. The photo used of Barton was the mug shot taken when he was arrested on August 4, 2009. R. 99, ll. 9 – 25; R. 100, ll. 1 – 24. Perez selected the photo of Barton as the person who robbed him. R. 102, ll. 1 – 25; R. 103, ll. 1 – 25; R. 104, ll. 1 – 23.

Investigator King testified that the picture used in the photo line up was the same mug shot that appeared in the “mug shot” magazine. R. 105, ll. 24 – 25; R. 106, ll. 1 – 23; R. 107, ll. 1 – 3; R. 45, l. 1 – 6.

During the Neil v. Biggers hearing, defense counsel called as an expert witness, Dr. Lori Van Wallendael, who was an associate professor of psychology at the University of North Carolina at Chapel Hill. R. 47, ll. 16 – 25. She was qualified as an expert in eyewitness identification. Her specialty was eyewitness memory. R. 48, ll. 1 – 25.

Dr. Van Wallendael testified that the identification by Perez was unreliable. R. 49, ll. 13 – 25; R. 50, ll. 1 – 4. She explained the factors that made the identification unreliable. The first one was that the victim/witness was inebriated at the time of the incident. People who were inebriated did not take in as much information from a scene as someone who was not inebriated, and were more likely to make a false identification. R. 50, ll. 4 – 18.

The second factor was that a weapon was said to be involved which created a greater likelihood of false identification because the person was more focused on the weapon. R. 50, ll. 22 – 25; R. 51, ll. 1 – 10.

The third factor where Perez was able to give a better description of the female co-defendant Rice meant that he was paying less attention to the male than female. R. 52, ll. 1 – 12.

The photo lineup was not reliable because Perez had prior exposure to the mug shot. The fact that the state was not involved on that exposure made the situation worse because there was no controlled circumstance. Also, because Perez had seen the photo before, he may have selected it because it looked familiar due to the prior exposure. R. 52, ll. 13 – 25; R. 53, ll. 1 – 25; R. 54, ll. 1 – 8.

The doctor also said the photo lineup should have been based on the description given by the victim, and not on Barton's physical description. R. 54, ll. 9 – 25; R. 55, ll. 1 – 25.

The doctor said the two most significant factors that made the identification unreliable were the victim's state of intoxication, and the prior exposure to the "mug shot" magazine. R. 56, ll. 1 – 5.

The solicitor objected to the testimony of the expert concerning the prior exposure to the mug shot because there was no state action involved. R. 52, ll. 17 – 25.

Defense counsel argued that the in-court identification should not be allowed because the out-of-court identification was suggestive pursuant to Neil v. Biggers, 409 U.S. 188 (1972). Counsel argued there was state action involved in the identification process. R. 59, ll. 11 – 25.

Counsel argued the second inquiry related to due process and whether there was a substantial likelihood of misidentification. Counsel stated pointed out there was a violation of due process whether there was governmental action or not. The exposure to the “mug shot” magazine was a violation of due process when Barton was the only man in the magazine with an armed robbery charge, and the state used the same mug shot in the photo lineup that the victim saw in the magazine. R. 60, ll. 1 – 25; R. 61, ll. 1 – 5.

The judge ruled that the “mug shot” magazine was not the result of government action, and therefore it was not admitted. However, he ruled that the photo lineup was appropriate and was admitted. The expert did not testify. Before the jury. R. 61, ll. 6 – 25; R. 62, ll. 1 – 3; R. 2 – 4.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court set out a two prong process to determine if an out-of-court identification was admissible: (1) if the identification process was unduly suggestive and (2) if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, *id.*; State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003).

An in-court identification of an accused is inadmissible if out-of-court identification was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Neil v. Biggers cites five factors to determine reliability: (1) opportunity of witness to view criminal at time of crime (2) witness' degree of

attention (3) accuracy of witness's prior description of criminal (4) level of certainty by witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers, *supra*.

In State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), and State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), the South Carolina Supreme Court held that a criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification.

The case of People v. McDonald, 37 Cal. 3d 351 (1984), held that there can be testimony that people who identify can be mistaken as there were factors that jurors would not think about which may influence a person's ability to identify, such as cross-racial identification or the effects on memory of the witness's exposure to suggestions.

In State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991), the Supreme Court held that expert testimony on eyewitness reliability was admissible, where main issue is identity of the perpetrator, sole evidence of identity is eyewitness identification, and identification is not substantially corroborated by evidence giving it independent reliability.

In State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), the Court of Appeals ruled that the pretrial identifications based on media representations of the defendant did not violate the defendant's due process rights because the televised bond hearing and newspaper article were non-governmental sources of the suggestiveness.

Barton's case is distinguished because the suggestiveness came from the mug shot which was taken by the government when Barton was arrested. The "mug shot" magazine had to obtain the mug shot through the state.

In United States v. Holley, 502 F.2d 273 (U.S. Ct App. Fourth Circuit 1974), the Fourth Circuit held that to guard against misidentification, it is not enough that the trial judge be

specifically alerted to the detailed factors that enter into the totality of the circumstances; the jury should also be charged. In this case where there was no evidence of identification except of one eyewitness, the Fourth Circuit wrote:

Where the identification testimony was so lacking in positiveness as to strongly suggest the likelihood of irreparable misidentification, the jury should have been specifically instructed to consider the possibility of misidentification under the specific circumstances revealed by the evidence.

In United States v. Telfaire, 469 F.2d 552 (U.S. Ct App. District of Columbia 1972), the District Court held that in deciding whether to permit a criminal case to go to the jury where the identification rests on the testimony of one witness, trial court should determine whether the totality of the circumstances gives rise to a very substantial likelihood of irreparable misidentification.

In Barton's case, the identification was unduly suggestive and should not have been allowed into evidence.

The Court of Appeals held that the trial court did not abuse its discretion in admitting the eyewitness identification because none of the circumstances affecting the reliability of the photo lineup were brought about by improper police conduct. The Court misapprehended the issue as the magazine had to obtain the photo through the state in some way, and this same photo was used in the photo lineup which was prejudicial to Barton as it made the identification unreliable.

ISSUE TWO: In his trial for armed robbery of Perez on July 25, 2009, defense counsel requested a jury charge on identification of Barton by Perez. Counsel said that her Request # 7 addressed identification specifically. The judge said: "Right." R. 134, ll. 10 – 24.

Following jury charges, the judge asked if there any objections to the charges. Defense counsel objected that the judge did not charge points 3 -6 on her Request # 7 regarding identification. She said the judge did not go through these points which related to witness credibility

such as whether the witness was paying careful attention. Counsel asked the judge to present those points to the jury. R. 178, ll. 1 – 13.

The judge said he thought he the issues were adequately covered in his charge. The solicitor agreed with the judge. The judge said it was noted for the record. R. 178, ll. 14 – 21.

Defense counsel's Request # 7 provided in pertinent part:

In evaluating the reliability of the identification of the defendant, you must consider the circumstances under which the eyewitness made the observations. In this regard, you may consider:

3. Whether the witness seemed as though he was paying careful attention to what was going on;
4. Whether any description given by the witness was close to the way the defendant actually looked;
5. How much time had passed between the crime and the first identification by the witness;
6. Whether, at the time of the first identification by the witness, the conditions were such that the witness was likely to make a mistake because he was "cued" by the circumstances. For example, was the witness asked to pick out the person he saw from a group of similar people, was the witness asked to pick out the defendant from a group of dissimilar people, or was witness asked if the defendant standing alone was the person involved.

See Request #7.

The judge gave the following charge:

An issue in this case is the identification of the defendant as the person who committed the crime charged. The state has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt the accuracy of the defendant---excuse me---the accuracy of the identification of the defendant before you may convict him. Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available to view, how far or close the witness was, the lighting conditions and whether the witness had the chance to see or know the

person in the past. Once again, I instruct you that the burden of proof on the state extends to every element of the crime charged, and this burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed this offense.

R. 170, ll. 8 – 25; R. 171, ll. 1 – 11.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme Court held that in reviewing jury charges for error, the Supreme Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.

The Supreme Court held in State v. Day, 341 S.C. 439, 452, 529 S.E.2d 431 (2000), that the failure to tailor jury instructions to adequately reflect the facts and theories presented by the defendant constituted reversible error. In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Supreme Court reversed and remanded Fuller's conviction of voluntary manslaughter because the Court held that it was reversible error where the trial court failed to charge on the elements of defense which were applicable to the issues raised by the defendant.

The only evidence against Barton were the identification of him by Perez, the victim, and Co-defendant Rice. There was no physical evidence such as DNA. Rice did not see a weapon, and testified that she did not really see anything but saw Barton run. R. 131, ll. 11 – 14; R. 115, ll. 14 – 25; R. 213, ll. 5 – 25. Rice was a biased witness because she was initially charged with the armed robbery. Her charges were dismissed the week before Barton's trial after she spent eleven months in jail on the charges. R. 111, ll. 1 – 12; R. 121, ll. 17 – 25; R. 122, ll. 1 – 25. She was convicted in 2008 for lying to the police about her name. R. 111, ll. 13 – 21.

Therefore, Perez's identification was significant evidence. The jury asked to rehear Perez's testimony. R. 179, ll. 1 – 25; R. 180, ll. 1 – 14. Because his identification was suggestive based on his inebriation at the time, and his prior exposure to the mug shot which was used in the photo lineup, the judge should have given all of the requested jury charge which was broader than the charge he gave. The totality of the circumstances required that the trial judge give a detailed instruction to the jury on the identification.

The Court of Appeals held that Barton had ample opportunity to highlight the circumstances that may have affected the two eyewitness identifications so the trial court's instruction on the accuracy of the identifications, which did not include all of the language Barton requested, was not prejudicial to Barton. The Court misapprehended the issue because the retrial judge's charge did not include the factors from Neil v. Biggers, *supra*. The requested charge contained factors very close to the Biggers factors.

The Court of Appeals wrote that Barton had ample opportunity, through cross-examination and closing argument, to highlight the circumstances that may have affected the two eyewitness identifications. However, in State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981), the Supreme Court wrote in South Carolina, the argument of counsel is not a substitute for a jury charge.

ISSUE THREE: After the judge charged the jury, which included the charge on armed robbery and strong armed robbery, the jury requested the definitions of armed robbery and strong armed robbery again. R. 171, ll. 12 – 25; R. 172, ll. 1 – 25; R. 173, ll. 1 – 17; R. 180, ll. 19 – 25. The judge brought the jury to the courtroom and read the charges on armed robbery and strong armed robbery the second time. R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 8.

The solicitor objected because the judge did not include the words “or representation of a weapon” at the beginning of his charge on strong armed robbery when he was describing it as a lesser included of armed robbery. The solicitor argued that the judge did include those specific words when he defined armed robbery, but did not include them in his definition of armed robbery at the beginning of his charge on strong armed robbery. R. 184, ll. 11 – 25; R. 185, ll. 1 – 13.

The judge initially said he thought it was covered but then decided to charge the jury a third time on armed robbery and strong armed robbery. Defense counsel objected to the recharge because she argued that it would only highlight the issue. R. 185, ll. 14 – 25.

The judge then charged the jury the third time on armed robbery and strong armed robbery. R. 186, ll. 1 – 25. Defense counsel objected again arguing that the recharge only highlighted the aspect which was “especially problematic” since the victim did not understand English, and would not understand if the robber said he was armed with a deadly weapon. R. 187, ll. 1 – 12.

In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme court held that a jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. The Court also held that in reviewing jury charges for error, the Supreme Court must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial. Id.

The judge giving the charges on armed robbery and strong armed robbery a second and third time was prejudicial to Barton as it did highlight "representation of a weapon." This had an impact on the jury because the jury found him guilty of armed robbery but not guilty of the possession of a weapon. Without the judge's emphasis on the "representation of a weapon", there is a reasonable probability that the jury would have found him not guilty of armed robbery or may have found him guilty of only strong armed robbery.

All of the judge's three charges on armed robbery contained the words "or the representation of a weapon or alleged, either by action or words, that he was armed." R. 172, ll. 9 – 16; R. 182, ll. 11 – 18; R. 186, ll. 3 – 15. His original charge and second charge on strong armed robbery did not include those words when he said if the jury believed the state did not prove he was armed with a deadly weapon. R. 173, ll. 3 – 7; R. 183, ll. 5 – 10. His third charge read: "if you find that the state has failed to prove that the defendant was armed with a deadly weapon or with the representation of a deadly weapon after having alleged that he was armed." R. 186, ll. 16 – 25.

On the third charge, the judge added a sentence which read:

So, just remember it's not, uh, just a deadly weapon, but it could also be a representation of a deadly weapon once the person has alleged he was armed.

R. 186, ll. 21 – 24.

The Court of Appeals held that the trial court did not place undue emphasis on the phrase "representation of a weapon." The Court wrote that even if the object held against the victim's neck was not a knife, this act was designed to give the victim the impression that the object could inflict bodily harm. The Court misapprehended the issue because the trial judge gave the charge on armed robbery three times. Adding the words "representation of a weapon" after he gave a charge without them only drew attention to those words which was prejudicial to Barton.

In State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002), the Supreme Court held that words alone were not sufficient to establish a representation of a deadly weapon , for purposes of the armed robbery statute. The court also wrote that where the evidence is insufficient to sustain a conviction on the greater offense but is legally sufficient on the lesser, the Court on appeal may direct the entry of judgment on the lesser offense.

In Barton's case, there were no words to go with the representation. Therefore, there was not a valid basis to support the armed robbery . The judge gave the jury a basis to convict of armed robbery that was not supported by the evidence.

ISSUE FOUR: On August 9, 2010, Barton filed a document with the clerk of court entitled: "Formal Complaint." In that document, Barton requested that his attorney be relieved and outside counsel be appointed to represent him. Court's Exhibit 1.

At the beginning of his trial, Barton's attorney told the court that there was an issue with hybrid representation, and her client, Bobby Barton, wanted to go forward with his motion at that time. R. 6, ll. 8 – 12. Barton presented a written copy of his motion to the judge which was made a Court's Exhibit. R. 6, ll. 13 – 25.

The judge told Barton after reading the motion that Attorney Ross was a competent attorney and zealous advocate who was appointed to represent him. The judge denied Barton's motion. R. 7, ll. 1 – 19.

Barton asked to speak which the judge allowed. Barton explained to the judge that his attorney had breached his confidentiality which was information that only the two of them knew at the time she divulged. R. 7, ll. 24 – 25; R. 8, ll. 1 – 16. He argued that his co-defendant was a woman whom he had lived with two years. The co-defendant acted as though he was a stranger that

she had just met who was always trying to be with her. He said this was not true. He told his attorney this and gave her the addresses where they had lived. R. 9, ll. 1 – 25.

His attorney breached his confidentiality when she told Investigator Jarvis at the Preliminary Hearing about this, and asked if he knew this. That removed the element of surprise which Barton wanted to use in the trial court. He told her this in the “strictest of confidence.” R. 10, ll. 1 – 22.

His attorney then told the court that the information was told in the context of a motion to reconsider the bond. She argued that she was not given this information in confidence. She said the main problem was hybrid representation. She said Barton had filed numerous motions on his own. R. 10, ll. 24 – 25; R. 11, ll. 1 – 25; R. 12, ll. 1 – 25; R. 13, ll. 1 – 11. The judge denied Barton’s motion for a different attorney. The judge said the case was going forward. When he asked if Barton wanted his attorney to continue to represent him or did he want to represent himself, Barton said he did not want attorney Ross to represent him. R. 13, ll. 12 – 25; R. 14, ll. 1 – 23. The judge asked Attorney Ross to continue to represent Barton which she agreed to do. R. 14, ll. 24 – 25; R. 15, ll. 1 – 7.

The solicitor told the court at that point that he knew the information that Barton said was breached, because the solicitor had learned it through independent means. He said it was not based on anything Attorney Ross said. The solicitor said that his investigator learned this from talking to the co-defendant. R. 15, ll. 6 – 24.

Barton argued to the court that the solicitor did not know this information when his attorney disclosed it on November 12 as Investigator Jarvis said at the time that he did not know that. The judge denied Barton’s motion again. R. 16, ll. 1 – 25.

In State v. Justus, 392 S.C. 416, 709 S.E.2d 668 (2011), the Supreme Court held that a motion to relieve counsel was addressed to the discretion of the trial judge and would not be

disturbed absent an abuse of discretion. The movant seeking to relieve counsel bears the burden to show satisfactory cause for removal. State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007).

Rule 1.6(a), RPC, Rule 407, SCACR, provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). Paragraph (b) provides that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.

In United States v. Mullen, 32 F.3d 891 (U.S. Ct App. 4th Circuit 1994), the 4th Circuit held that in evaluating whether the trial court abused its discretion in denying defendant's motion for substitution of counsel, the appellate court considers three factors: timeliness of the motion; adequacy of the trial court's inquiry into the defendant's complaint; and the attorney-client conflict whether it was so great that it resulted in a total lack of communication preventing an adequate defense.

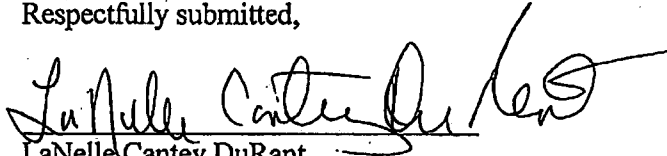
In Barton's case, these three factors were met. Barton's Motion to Substitute counsel was filed timely (See Court's Exhibit 1). The trial court only gave Barton's complaint a cursory review without going into the details of the complaint. A breach of confidentiality, as Barton explained, is a violation of the Rules of Professional Responsibility. As Barton explained, trust no longer existed. A breakdown in communication occurred.

Barton disclosed the information concerning his co-defendant in confidence to his attorney. He did not give her permission to divulge or use this information. Barton did not need to tell her that it was in confidence because information he related to her should be considered in confidence. The attorney needed to seek consent from Barton to divulge anything he told her.

The Court of Appeals held that the trial court acted well within its discretion in denying Barton's motion to relieve trial counsel as Barton was not prejudiced by trial counsel's revelation of information prior to trial. The Court misunderstood the issue because the relationship between Barton and his attorney was damaged since Barton perceived the disclosure as a breach of confidentiality.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 14th day of February, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOBBY J. BARTON,

APPELLANT

APPELLATE CASE NO. 2010-169826

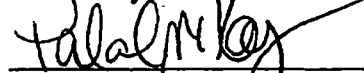
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of February, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day
of February, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Bobby J. Barton, Appellant.

Appellate Case No. 2010-169826

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MAR 20 2013

CLERK OF THE
APPELLATE COURT

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul W. Brown J.

John O. Senter J.

Columbia, South Carolina

cc:

William M. Blich, Jr.
LaNelle Cantey DuRant

FILED

20 Mar 2013

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Edward W. Miller, Circuit Court Judge

RECEIVED
JUN 19 2013
S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

BOBBY J. BARTON,

APPELLANT

APPELLATE CASE NO. 2010-169826

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
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COUNTY OF GREENVILLE	)	Case No(s) : 09-GS-23-10018
	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
Bobby Joe Barton,	)	
	)	
Defendant.	)	
_____	)	

August 9-10, 2010
Greenville, South Carolina

B E F O R E:

HONORABLE EDWARD W. MILLER, Judge.

A P P E A R A N C E S:

L. MARK MOYER, Esquire
Attorney for the State

SUSANNAH ROSS, Esquire
Attorney for the Defendant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

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P R O C E E D I N G S

1
2 (WHEREUPON, the proceeding begins on the 9th day
3 of August, 2010 at approximately 11:36 a.m.)

4 THE COURT: Y'all tell me what POWDCVC is?

5 MR. MOYER: Possession of a Weapon During
6 the Commission of a Violent Crime.

7 THE COURT: Okay.

8 MS. ROSS: Judge, uh, we've had some issues
9 with hybrid representation to come up. I've
10 advised my client to wait until we draw a jury
11 before he makes his motions, but he tells me he's
12 ready to go.

13 MR. BARTON: May I get the bailiff to take
14 -- bring this to you, sir?

15 THE COURT: Yeah.

16 MR. BARTON: Appreciate it. Thank you very
17 much. A copy of this, this, this is one for
18 Ms. Ross, this is one for the Solicitor.

19 THE COURT: You sent me one and a copy? Is
20 that what you sent me?

21 MR. BARTON: The reason --

22 THE COURT: This the same document?

23 MR. BARTON: The reason it's -- yes, sir.

24 THE COURT: Okay. Uh, I'll be happy to make
25 the original a Court's exhibit.

1 **MR. BARTON:** Yes, sir.

2 **THE COURT:** And, uh, I'll just tell you, uh,
3 this thing is dated August 6th. When did you get
4 notice of the trial date, Ms. Ross?

5 **MS. ROSS:** Uh, about two weeks ago.

6 **THE COURT:** Okay. Let him know about it?

7 **MS. ROSS:** Yes, I did.

8 **(WHEREUPON, Court's Exhibit 1 is marked for**
9 **identification purposes.)**

10 **THE COURT:** All right. Uh, Mr. Barton, you
11 are entitled, under the Constitution, to be
12 represented by a competent attorney. You are
13 represented by a competent attorney. You are not
14 allowed to pick and choose who you get. So Ms.
15 Ross has been appointed to you. She is an
16 experienced, intelligent, zealous advocate. And,
17 uh, absent some other showing, I'm going to deny
18 your motion. You're certainly not getting
19 another lawyer. Okay.

20 **MR. BARTON:** May I speak?

21 **THE COURT:** Yes, sir.

22 **MR. BARTON:** Uh, --

23 **THE COURT:** Stand up when you speak to me.

24 **MR. BARTON:** Yes, sir. As I said, uh,
25 regardless, Ms. Ross has breached confidentiality

1 of my case. And if you want -- if you would like
2 to go on record with that, then you can, sir.
3 You are the judge. I'm not trying to be rude or
4 smart to you. I'm just being very honest with
5 you. She has breached confidentiality of my
6 case. I have been known about it. Only
7 information that only she and I known at that
8 specific time, she divulged it. I'm making that
9 known to the court. I'm going on record.

10 There are other motions, but I think that
11 takes precedence and priority. So you are the
12 judge. I'm not trying to be smart with you. I
13 been in front of you before. Like you said, you
14 make that decision, but I also ask you to let
15 that be known that I said that she has breached
16 confidentiality.

17 **THE COURT:** What has she done to breach your
18 confidentiality?

19 **MR. BARTON:** Uh, you would like for me to
20 say it on court?

21 **THE COURT:** Raise your right hand. You
22 swear to tell the truth?

23 **MR. BARTON:** Yes, I do, sir.

24 **THE COURT:** Okay. You made this motion in
25 open court.

1 **MR. BARTON:** Yes, sir.

2 **THE COURT:** If you want to substantiate it,
3 you better ---

4 **MR. BARTON:** Yes, sir.

5 **THE COURT:** I mean, it's up to you. You
6 might want to consult with her about what you are
7 going to tell me before you say it, but --

8 **MR. BARTON:** I don't need to consult because
9 she already know what it is, and I'm fixing to
10 tell you. Once -- once I got charged with this
11 and the female that's implicated me in this
12 robbery, she made a statement that I was somebody
13 that she had met somewhere who was always trying
14 to be with her. She didn't like me like that. I
15 told Ms. Ross that this was an ex-live-in common
16 law wife. I was not a stranger to this lady.
17 This lady make it seem like I was somebody who
18 she never known, who she never -- she lived with
19 me for over two years.

20 I told Ms. Ross, let's make a file against
21 her. I'll show you the address, show the address
22 where she and I both live in together, listed and
23 documents and some statements of past
24 allegations. I told Ms. Ross that and I gave her
25 papers and I showed it to her.

1 She turn around and told Investigator Jarvis
2 at the preliminary hearing, asked him did he know
3 that. Why would she ask him -- that was something
4 that we was going to use as an element of
5 surprise in this court. No one knew that she and
6 I lived together. She didn't tell them that.
7 She made them think that she was a stranger to me
8 and that's what he thought.

9 **THE COURT:** Okay. And that's what you are
10 upset about?

11 **MR. BARTON:** I think ---

12 **THE COURT:** Anything else?

13 **MR. BARTON:** I think it is a breach of
14 confidentiality. I'm pretty much sure it is
15 because they did not know that. What I told her
16 was in the strictest of confidence. I didn't
17 tell him. I told her.

18 **THE COURT:** Okay.

19 **MR. BARTON:** She is my attorney. By law,
20 she is not allowed to divulge that to anyone
21 without my consent.

22 **THE COURT:** Okay. Thank you.

23 Ms. Ross, anything you want to say?

24 **MS. ROSS:** Judge, my recollection of that
25 was that it was in the context of a motion to

1 reconsider the bond.

2 **MR. BARTON:** No, sir.

3 **MS. ROSS:** And that was part of that.

4 Otherwise, that was something that I was not
5 given in confidentiality. I simply asked him
6 that question of Jarvis. If, in fact, I did ask
7 it in the prelim, I don't have independent
8 recollection. If I did, I would simply ask that
9 question to see if he could investigate that
10 route. I don't think that was confidential
11 information. Certainly, their witness is this
12 woman and they could find that information out
13 from her as well.

14 **THE COURT:** Okay.

15 **MS. ROSS:** I think a lot of the issue here
16 is simply hybrid representation. I'll just show
17 you the file of material that's been provided by
18 my client. I have gone over with him a number of
19 times the rules on hybrid representation that he
20 can either represent himself or I will represent
21 him. I'm prepared to go forward and represent
22 him today. I think he has a lot of strength to
23 his case.

24 He's argued about his case quite a bit.

25 Throughout the representation, he's been

1 apparently setting up PCRs, threatening me about
2 what will happen if I don't file his motions and
3 file the motions that he wants, how he wants
4 them. So I would like just a ruling on that to
5 make sure we all know on the table who represents
6 who and how this process works.

7 **THE COURT:** Okay. Yes, Mr. Barton.

8 **MR. BARTON:** Yes, sir. She changed the
9 whole issue. It has nothing to do with hybrid
10 representation. I said she breached
11 confidentiality in my case. And I told her --

12 **THE COURT:** Okay.

13 **MR. BARTON:** I told her in confidence. They
14 did not know that. I told her for the simple
15 reason that --

16 **THE COURT:** You've said all that. You've
17 said all that. Okay.

18 Ms. Ross, is this the first you've heard of
19 this issue?

20 **MR. BARTON:** No, it's not.

21 **THE COURT:** Just a minute, sir.

22 **MS. ROSS:** The formal complaint, he had not
23 told me anything about the formal complaint. He
24 had complained a number of times before that I
25 should not have questioned or should not have

1 brought out in any way. I think I made part of
2 the bond -- motion to reconsider bond the fact
3 that the victim, uh, -- that this witness had
4 lied about the prior relationship. I put that in
5 the motion to reconsider bond. Mr. Barton has
6 complained at length about that as his complaint
7 about me not getting medical records of this
8 witness that, of course, can't be gotten under
9 regulations and a number of other complaints.
10 But as far as the formal complaint, I did not
11 know that was coming today.

12 **THE COURT:** Okay. Well, Mr. Barton, Ms.
13 Ross is your attorney. I'm not going to give you
14 another attorney. This case is going forward.
15 The jury is out there. We're going to pick this
16 jury. Do you want her to represent you or do you
17 want to represent yourself?

18 **MR. BARTON:** Well, Judge, since you are the
19 judge, sir, and it's your courtroom, you do any
20 way you see fit.

21 **THE COURT:** So you don't have any input on
22 that?

23 **MR. BARTON:** Evidently I don't because I --

24 **THE COURT:** No, sir. I just asked you.

25 **MR. BARTON:** I know.

1 **THE COURT:** You want Ms. Ross to continue as
2 your attorney or do you want to represent
3 yourself?

4 **MR. BARTON:** First of all, I asked that you
5 acknowledge that she breached confidentiality ---

6 **THE COURT:** No, sir.

7 **MR. BARTON:** --- in my case.

8 **THE COURT:** No, sir. Let me just tell you
9 something. I'll ask you this question one more
10 time. Do you want Ms. Ross -- what is your
11 desire? Do you want Ms. Ross to represent you or
12 do you want to represent yourself?

13 **MR. BARTON:** I don't want her to represent
14 me.

15 **THE COURT:** So you want to represent
16 yourself?

17 **MR. BARTON:** I'm telling you, sir, that I do
18 not want her to represent me because she breached
19 my case. That's my answer. Now, you do what you
20 want, sir.

21 **THE COURT:** That's not an answer to my
22 question.

23 **MR. BARTON:** Okay.

24 **THE COURT:** Ms. Ross, these are obviously
25 difficult circumstances, but I, for the benefit

1 of Mr. Barton, in spite of his complaints, I'm
2 going to ask that you continue to represent him.
3 Okay?

4 **MS. ROSS:** And I'm prepared to go forward.
5 I'll be happy to do that.

6 **THE COURT:** All right. Anything from the
7 State?

8 **MR. MOYER:** I just want to put one thing on
9 the record. Everything the Defendant said -- he
10 said nothing that I wasn't aware of. I did not
11 -- I gained all that information through
12 independent means. I wasn't at this supposed
13 hearing, bond hearing or preliminary hearing when
14 that came out. I just want the court record to
15 reflect that that's not surprising, anything he
16 said. And that was not based on anything Ms.
17 Ross said.

18 **THE COURT:** You learned that information
19 about him living with this woman, this witness
20 independently?

21 **MR. MOYER:** That's correct.

22 **THE COURT:** Did you learn it from her?

23 **MR. MOYER:** Yes, from her and from the
24 investigator telling me what she told him.
25 Nothing -- I didn't learn anything from anything

1 Ms. Ross said.

2 **THE COURT:** One last comment, Mr. Barton.

3 **MR. BARTON:** Yes, sir. When Ms. Ross did
4 that -- that is not true. He did not know. She
5 did that on November the 12th. And Ms. Rice had
6 not told Investigator Jarvis that. It should be
7 not he transcripts. He answered no, I did not
8 know that. Neither did they know that.

9 **THE COURT:** Okay.

10 **MR. BARTON:** That is not the truth. That
11 was November the 12th in this courthouse.

12 **THE COURT:** Your motion is denied.

13 All right. Is the jury out there? You
14 ready?

15 **THE BAILIFF:** Yes, sir.

16 **THE COURT:** Okay.

17 **MS. ROSS:** Judge, may we approach?

18 **THE COURT:** Sure.

19 (WHEREUPON, a bench conference is held off the
20 record at approximately 11:48 a.m.)

21 (WHEREUPON, the bench conference concludes at
22 approximately 11:49 a.m.)

23 (WHEREUPON, the jury panel enters at approximately
24 11:49 a.m.)

25 **THE COURT:** All right. Good morning, Ladies

1 12:25 p.m.)

2 **THE COURT:** Okay. Anything we need to take
3 up before we crank it up?

4 **MR. MOYER:** I think we have a Neil v.
5 Biggers, uh, hearing that we have to have. There
6 was a photo lineup used.

7 **THE COURT:** Okay.

8 **MS. ROSS:** We move to suppress the
9 identification.

10 **THE COURT:** Okay. Uh, maybe we should cut
11 them loose for lunch.

12 All right. Mr. Cooke, would you go tell them
13 they don't have to do their election until they
14 come back from lunch. Tell them we have some
15 matters we have to discuss. I'm going to give
16 them a two-hour lunch. Tell them to be back at
17 2:30. Okay?

18 **THE BAILIFF:** Okay.

19 **THE COURT:** Okay.

20 **MR. MOYER:** Ready, Your Honor?

21 **THE COURT:** Yes, sir.

22 **MR. MOYER:** Okay. The State will call
23 Investigator Tracy King to the stand.

24 **TRACY KING**

25 having first been sworn, testifies as follows:

DIRECT EXAMINATION

2 **BY MR. MOYER:**

3 **Q** All right. Uh, state your full name.

4 **A** Alvin Tracy King.

5 **Q** And where do you work?

6 **A** I work for the Greenville County Sheriff's
7 Office. I'm assigned to the Armed Robbery Unit.

8 **Q** Okay. How long have you been in law
9 enforcement?

10 **A** 15 years.

11 **Q** Has that all been with the Sheriff's Office?

12 **A** Yes, sir.

13 **Q** How long have you been an investigator?

14 **A** Uh, 10 years.

15 **Q** Okay. All right. Now did you conduct a
16 photographic lineup display in this case?

17 **A** I did.

18 **Q** When did you do that lineup?

19 **A** That was on January the 8th of this year.

20 **Q** Okay. And were you aware that the incident
21 took place July the 25th of last year?

22 **A** At the time, I was not, but yes.

23 **Q** Okay. You didn't have any involvement in
24 this case other than this lineup, right?

25 **A** That's correct.

1 Q So it was about four or five months after the
2 fact?

3 A That's correct.

4 Q All right. Now, did you put the photo lineup
5 together?

6 A I did.

7 Q And how many photographs were displayed in
8 that lineup?

9 A Six photos.

10 Q Was the Defendant included in the lineup?

11 A Yes, he was.

12 Q And the photograph you got of him was taken
13 on what date?

14 A It was on the arrest date of 8/4 of '09.

15 Q That was the date he was actually arrested
16 for this charge?

17 A That's correct.

18 Q He was arrested on other evidence other than
19 this photo lineup?

20 A To my knowledge, yes.

21 Q Okay. Uh, now, were the other five persons
22 in the lineup all similar in physical description to
23 the Defendant?

24 A They were.

25 Q As in sex and race and facial hair and so

1 forth?

2 **A** And age, yes, sir.

3 **Q** Would you explain to the Court how -- first
4 off, let me ask this, who did you show this photo
5 lineup to?

6 **A** I showed it to the victim, Edward -- Edwin
7 Perez.

8 **Q** Okay. And you already said it was July the
9 8th of this year.

10 **A** January the 8th.

11 **Q** I'm sorry. January the 8th.

12 **A** That's correct.

13 **Q** And what was the time?

14 **A** Uh, it was in the morning a little bit after
15 10:00, 10:00 a.m.

16 **Q** Okay. And where did this take place?

17 **A** My office in the basement of the Law
18 Enforcement Center.

19 **Q** All right. Now you already told us you
20 didn't have any participation in the case prior to
21 this date.

22 **A** That's correct.

23 **Q** How about after the case?

24 **A** Just the photo lineup.

25 **Q** Just the photo lineup?

1 **A** Yes, sir.

2 **Q** Okay. Now what was the reason you got
3 involved?

4 **A** Investigator Jarvis called me on this
5 particular date, advised me that the victim in the
6 case was to be at the Law Enforcement Center. He
7 advised me that he was at home sick and requested that
8 I put together a photo lineup and show it to the
9 victim.

10 **Q** Other than that conversation, you weren't
11 aware of any details in the case other than that
12 conversation?

13 **A** No, sir. I was not.

14 **Q** Okay. You don't speak Spanish, do you?

15 **A** No.

16 **Q** How did you communicate with Mr. Perez

17 **A** Mr. Perez, uh, -- Investigator Jarvis
18 informed me that Mr. Perez was bringing his brother
19 along with him who spoke English.

20 **Q** Okay. And so you, uh, communicated with Mr.
21 Perez then through his brother?

22 **A** Yes, that's correct.

23 **Q** And did his brother speak good English?

24 **A** Yes, yes.

25 **Q** And were you able to communicate with him?

1 **A** Absolutely. Very clearly.

2 **Q** Okay. What did you tell Mr. Perez through
3 his brother before you showed him the lineup?

4 **A** I informed him that I had put together six
5 pictures that I was going to show him. I requested
6 that, uh, he point out anyone he recognized and
7 explain to me how he recognized them. I informed his
8 brother to inform him that he should not feel in any
9 way, shape or form that he has to pick out anybody.
10 Then, at that point, I handed him the photo lineup
11 upside down and advised his brother to let him know
12 that whenever he was ready, he could turn it over and
13 take a look at it.

14 **Q** Okay. That's what you told him. Did you go
15 through with it like you just explained to us?

16 **A** That's correct.

17 **Q** What did Mr. Perez do when you gave him the
18 photo lineup?

19 **A** He turned the photo lineup over. I watched
20 him looking over the lineup. You could see him go
21 from left to right, top to bottom. He was looking
22 over the photos. When he got to the center photo,
23 which was the Defendant in this case, that's the
24 position he was in, the center bottom row, he stopped,
25 pointed at him and said that's him in Spanish, which

1 is what the brother translated to me.

2 **Q** Okay. But you saw him actually point at the
3 photograph?

4 **A** I did.

5 **Q** So he pointed at the picture of Bobby Barton?

6 **A** That's correct.

7 **Q** Is he the Defendant in this case?

8 **A** That's correct.

9 **Q** The Defendant seated over here in the defense
10 chair. Did you, at any time during this procedure,
11 exert any pressure on Mr. Perez to pick somebody out
12 of the lineup?

13 **A** Absolutely not.

14 **Q** Or in any way influence his decision on who
15 to select?

16 **A** No, sir.

17 **Q** How certain or how confident did Mr. Perez
18 appear to you?

19 **A** He appeared very confident.

20 **Q** Did you make any mark or did you ask him to
21 do anything to the photo lineup to indicate his
22 choice?

23 **A** I did. Through his brother, who translated
24 for me, I advised him that I needed him to circle the
25 photograph he had just pointed to and also sign below

1 that photo.

2 (WHEREUPON, State's Exhibit 1 is marked for
3 identification purposes.)

4 BY MR. MOYER:

5 Q All right. I'm going to hand you what's been
6 marked as State's Exhibit number 1. I'll ask you to
7 take a look at it. Do you recognize what I just
8 handed you?

9 A I do.

10 Q What is that?

11 A This is the six-picture photo lineup that I
12 displayed to the victim.

13 Q Okay. How do you recognize it?

14 A This is, uh, -- this is the one that I put
15 together. It's also got my signature as well as the
16 victim's signature, date, and, uh, time on it.

17 Q Okay. Does it -- is it in substantially the
18 same condition now as it was when you showed it to Mr.
19 Perez on January the 8th of 2010?

20 A It is.

21 Q Okay. You don't see any additions,
22 deletions, changes or anything ---

23 A No.

24 Q --- to that form?

25 MR. MOYER: All right. Your Honor, at this

1 time, I would move to have State's Exhibit number
2 1 entered into evidence for purposes of this
3 hearing.

4 **MS. ROSS:** No objection.

5 **THE COURT:** All right.

6 (WHEREUPON, State's Exhibit 1 is admitted into the
7 record.)

8 **MR. MOYER:** And please the Court, I will
9 hand this up to the Court.

10 **THE COURT:** Okay.

11 **MR. MOYER:** Uh, I have no further questions
12 for this witness at this time.

13 **THE COURT:** Okay. Cross.

14 **CROSS-EXAMINATION**

15 **BY MS. ROSS:**

16 **Q** Okay. Uh, Investigator King, are you aware
17 that January 8th, 2010th date was the date of a second
18 bond hearing for Mr. Barton?

19 **A** No, ma'am.

20 **Q** Okay. And, uh, why were you called in to do
21 the photo lineup instead of Jarvis?

22 **A** Uh, Investigator Jarvis was sick that day.
23 He informed me that he had already had it set up for
24 the victim to appear at the Law Enforcement Center on
25 that day. Investigator Jarvis was sick and at home

1 that day.

2 Q So he made no mention to you that that was
3 the actual date of a second bond hearing?

4 A No, ma'am. I have no knowledge of that.

5 Q All right. And you said you prepared the
6 photo lineup?

7 A That's correct.

8 Q Now, the initial description of the
9 perpetrator in this case was a black male, 25 to 30
10 years old. That was not what you were putting in this
11 lineup, was it?

12 A No, ma'am.

13 Q What was -- what was the characteristics that
14 you were putting in this lineup?

15 A Well, I was advised to, uh, -- I was advised
16 the name of the Defendant on that day to enter him
17 into a photo lineup.

18 Q Uh-huh.

19 A At that point in time, I used the actual
20 computer-generated matches to the Defendant. In other
21 words, we've got an option while building photo
22 lineups ---

23 Q Right.

24 A --- to allow the computer itself to provide
25 several similar or -- similar characteristics as far

1 as age, uh, and physical descriptions. I used that
2 option this case. It provides several hundreds,
3 sometimes thousands of similar photos. At that point,
4 I just went through and picked out similar photos of
5 the Defendant.

6 Q All right. So when you prepared this lineup,
7 you were preparing it with Bobby Barton as a suspect
8 in mind?

9 A That's correct.

10 Q Are you aware that Mr. Barton's photograph is
11 lighter or more overexposed than the other photographs
12 in the lineup?

13 A No.

14 Q And, uh, you stated that Mr. Perez did not
15 speak English. Who wrote out the affidavit on the
16 photograph identification?

17 A I did.

18 Q Now, were there any other witnesses to that
19 besides you?

20 A Mr. Amilcar Perez, the victim's brother.

21 Q All right. And no other officers, correct?

22 A Correct.

23 Q And the affidavit was not notified --
24 notarized?

25 A That's correct.

1 Q All right. Now, uh, are you aware of "mug
2 shot" magazine?

3 A I am.

4 Q Let me show you a copy that was provided to
5 me in the August 8th -- excuse me, August 10th "mug
6 shot" magazine. Uh, who is that pictured on page 3 of
7 "mug shot" magazine?

8 A That's the Defendant, Mr. Barton.

9 Q Isn't that, in fact, the exact same
10 photograph that you used in the photographic lineup on
11 page 3 of "mug shot" magazine?

12 A That's a rough copy, but it appears to be
13 his.

14 Q All right. And I'd also turn your attention
15 to page 8 of "mug shot" magazine. Who is the one
16 person on that page charged with Armed Robbery?

17 A Patricia Rice.

18 Q And are you aware that she was the co-
19 Defendant in this case?

20 A I learned that today.

21 Q Now, in fact, out of Greenville, if you would
22 just care to look through the "mug shot" magazine of
23 August 8th, are there any other Armed Robbery mug
24 shots in the Greenville area? It might take you a
25 little while to go through.

1 A (Reviewing).

2 Q I'll say in the Greenville area. They go on
3 to other areas of the state.

4 A Okay. I was going to say. I haven't seen
5 other than the Patricia Rice.

6 Q All right. So in that magazine, it was the
7 co-Defendant Patricia Rice and Bobby Barton are the
8 only mug shots showing an Armed Robbery?

9 A That's correct.

10 Q And "mug shot" magazine does put a name and
11 the charge next to the mug shot?

12 A Yes.

13 Q All right. Are you aware of the idea that if
14 someone sees a picture once and gets that picture in
15 their mind, that later in a photographic lineup, they
16 might pick out that same picture again?

17 A It is possible, yes.

18 Q All right. And as far as lineup, you chose
19 not to do, uh, a photographic identification procedure
20 where you took one picture at a time and show them one
21 at a time ---

22 A That's correct.

23 Q --- to Mr. Perez? All right. And you
24 prepared a supplemental report and it wasn't signed by
25 the reporting officer, was it?

1 A Say it again please.

2 Q In your supplemental report, it wasn't signed
3 by a reporting officer or dated, was it?

4 A It's dated and it's got my initials on it.

5 Q This is what he's talking about.

6 A Well, that copy doesn't have it on there.
7 But I do have my name. It's got the date and my
8 initials.

9 Q All right. So your copy does reflect that?

10 A That's correct.

11 Q And as far as beyond the photo lineup itself,
12 that was the extent of your involvement?

13 A That's correct.

14 MS. ROSS: Okay. I've got nothing further.

15 **REDIRECT EXAMINATION**

16 **BY MR. MOYER:**

17 Q Just a couple of quick followup questions.
18 The procedure that you used in this case for showing
19 the photo lineup, is that the procedure that you have
20 always used?

21 A It is.

22 Q As far as showing six photographs on a single
23 page?

24 A That's correct.

25 Q Is that the standard procedure used by the

1 Sheriff's Office?

2 **A** Pretty much, yes.

3 **Q** As far as you are aware, is that what all the
4 investigators use when they show a photographic
5 lineup?

6 **A** Unless there is extensive or exigent
7 circumstances, that's the exact procedure we use.

8 **Q** Under normal circumstances?

9 **A** Correct.

10 **Q** That's what you use. Uh, have you ever used
11 any other kind?

12 **A** I have.

13 **Q** Frequently?

14 **A** No. Absolutely not.

15 **Q** Just some situation where you weren't able to
16 use this six-person lineup?

17 **A** That's correct.

18 **MR. MOYER:** Okay. That's all.

19 **THE COURT:** All right.

20 **MS. ROSS:** Just briefly.

21 **THE COURT:** Sure.

22 **RECROSS-EXAMINATION**

23 **BY MS. ROSS:**

24 **Q** One thing. Uh, in a normal case when you put
25 together a photographic lineup, don't the pictures

1 match the description the victim gave of the subject
2 that they were after?

3 **A** That would depend on the information obtained
4 during the investigation.

5 **Q** All right. With an initial description of a
6 black male in his mid-20's or early 30's, wouldn't you
7 normally put together a lineup showing black males in
8 their mid-20s to early 30's?

9 **A** Again, if we get information to support that,
10 we would.

11 **Q** And as far as your knowledge of the case, was
12 there any call by Mr. Perez or any reports by Mr.
13 Perez changing his initial description?

14 **A** Not to my knowledge.

15 **MS. ROSS:** I've got nothing further.

16 **THE COURT:** All right. Thank you, sir. You
17 can step down.

18 **MR. MOYER:** The State would call Edwin Perez
19 and the State would also have to call Ms. Teresa
20 Sampson as interpreter.

21 **THE COURT:** Okay.

22 **MR. MOYER:** Mr. Perez.

23 **THE COURT:** Ask him to place his left hand
24 on the Bible.

25 **EDWIN PEREZ**

1 having first been sworn, testifies as follows:

2 **THE CLERK:** Please have a seat. Please have a
3 seat.

4 **DIRECT EXAMINATION**

5 **(WHEREUPON,** the following answers are given by the
6 interpreter.)

7 **BY MR. MOYER:**

8 **Q** All right. Mr. Perez, uh, where you the
9 victim of a robbery on the night of July the 25th of
10 2009?

11 **A** Yes.

12 **Q** Were you shown a photographic lineup on
13 January the 8th of 2010 to see if you could identify
14 the man who robbed you?

15 **A** Yes.

16 **Q** Did you meet with this investigator,
17 Investigator King, at the Law Enforcement Center to do
18 that?

19 **A** Yes.

20 **Q** Was your brother, Amilcar, with you?

21 **A** Yes.

22 **Q** Did he translate for you what Investigator
23 King was saying?

24 **A** Yeah, he told me that someone was going to
25 show me.

1 Q Okay. Mr. Perez, I want to show you State's
2 Exhibit number 1. Can you recognize that?

3 A Yes. This one.

4 Q Okay. Is this the photographic lineup that
5 you were shown by the investigator?

6 A Yes.

7 Q Now, when the investigator handed you that
8 photographic lineup, did he ask you to see if you
9 could recognize anybody in the lineup?

10 A Yes.

11 Q Which one did -- did you recognize somebody?

12 A Yes.

13 Q And which photograph did you recognize?

14 A This one.

15 Q Is it the one that is circled on that?

16 A Yes.

17 Q When you were shown that photo lineup, were
18 you absolutely sure that was the person who had robbed
19 you?

20 A Yes.

21 Q Okay. Did you look over all those
22 photographs carefully?

23 A Yes.

24 Q Did you pick them out yourself without any
25 influence by other people?

1 **A** Yes -- no, by myself. I did it myself.

2 **Q** Okay. I'm going to ask you a couple of
3 questions about the robbery itself.

4 **A** Yes.

5 **Q** When you were robbed, did you get a good
6 enough look at the man who robbed you and recognize
7 him later?

8 **A** Yes.

9 **Q** Where did the robbery happen?

10 **A** Behind my trailer.

11 **Q** Tell us what he did to you, how he robbed
12 you.

13 **A** Yes, he came and then he pushed me to the
14 ground and he got out his pocketknife.

15 **Q** Okay. What did he do with the pocketknife?

16 **A** He put it right there. Right here. And then
17 he took my wallet.

18 **Q** And right here being where? Your neck?
19 You're pointing to your neck?

20 **A** Yes.

21 **Q** And did this happen late at night?

22 **A** Yes, at night.

23 **Q** It was dark outside?

24 **A** Yes, it was dark.

25 **Q** Were there, uh, any lights around that

1 enabled you to see at all?

2 **A** Yeah, there were lights outside.

3 **Q** Okay. And you remember where the lights
4 were, what kind of lights they were?

5 **A** Yeah, just by the entrance of the trailer.
6 Right next to the entrance.

7 **Q** Now, the man who robbed you, had you ever
8 seen this man before that day?

9 **A** A little bit, not too much.

10 **Q** Okay. More than one time?

11 **A** Maybe two or three.

12 **Q** Okay. Where had you seen him?

13 **A** Just passing by, walking by.

14 **Q** Did he live in your neighborhood?

15 **A** Nearby. I think behind.

16 **Q** Okay. And by your neighborhood, I mean, you
17 lived in a trailer park, right?

18 **A** Yes.

19 **Q** All right. Now, isn't there a path that goes
20 from the neighborhood behind you that goes -- a
21 shortcut that goes through your trailer park to a
22 convenience store?

23 **A** Yeah, there is a shortcut there, but it
24 doesn't go to my trailer. It goes through another
25 trailer.

1 Q Okay. But it's close, it's nearby your
2 trailer?

3 A Yes.

4 Q It goes through your trailer park?

5 A Yes.

6 Q And it's common for people from the other
7 neighborhood to walk through that shortcut?

8 A Yes.

9 Q And that's where you had seen him before?

10 A Yes.

11 Q Now, when he robbed you, he obviously, from
12 what you described, was very close to you.

13 A Yes, nearby.

14 Q Okay. When he was robbing you, how close was
15 he to you?

16 A He was on top of me.

17 Q All right. So he got actually right up to
18 your face?

19 A Yes.

20 Q Now, after this happened, did a police
21 officer show up?

22 A No, I dial.

23 Q You dialed the police officer? Okay. And
24 your brother also spoke to the police officer.

25 A Yes, because they returned the phone call.

1 Q Okay. And a police officer came out and
2 talked to you that night.

3 A Yes, they arrived.

4 Q Did the police -- how did you talk to the
5 police officer? Did he speak Spanish?

6 A No.

7 Q So you had to speak to him through your
8 brother?

9 MR. PEREZ: Sí.

10 BY MR. MOYER:

11 Q Let me ask you a couple of questions about
12 this photo lineup. When you recognized the person in
13 that photographic lineup, did you tell the police
14 officer who you picked?

15 A Yes. When I went to see him.

16 Q Okay. Yes. What did you do -- what did the
17 officer ask you to do to the picture on that lineup?

18 A He asked me to circle.

19 Q Now, on the night this robbery happened, how
20 old did you think the man was who had robbed you?

21 A Maybe 30 or 40, somewhere around in there.

22 Q Okay. Is that what you tried to tell the
23 police officer through your brother?

24 A Yes.

25 Q Okay. You see the person who robbed you in

1 the courtroom here today?

2 **A** Yes.

3 **Q** Is it in the man in the blue shirt seated
4 over here?

5 **A** Yes.

6 **Q** Okay. And, uh, do you know now that he's
7 actually 52 years old?

8 **A** I don't know. I didn't know that.

9 **Q** Okay. So 30 to 40 was your best guess on how
10 he looked?

11 **A** Yeah, I just calculate.

12 **Q** Now, did you see a photograph of the person
13 who robbed you after the robbery took place?

14 **A** Yes.

15 **Q** How did you see this photograph?

16 **A** I saw in something, I don't know what it's
17 called, that I found on the floor.

18 **Q** Is it a magazine?

19 **A** Yes.

20 **Q** Is it a magazine that has lots of different
21 pictures of mug shots in it?

22 **A** Yes.

23 **Q** When you saw that magazine, uh, were there
24 any police officers or any, any, any police officers
25 at all with you when you saw that magazine?

1 **A** No.

2 **Q** So you were by yourself or with family?

3 **A** With my brother.

4 **Q** Okay. And you just opened the magazine up
5 and started looking through it?

6 **A** Yes.

7 **Q** And you saw the Defendant in this case, his
8 picture in that magazine?

9 **A** Yes.

10 **Q** But no police officers or government people
11 had anything to do with you seeing it?

12 **MS. ROSS:** At some point, I would object to
13 leading.

14 **THE COURT:** Hang on.

15 **MR. PEREZ:** No.

16 **THE COURT:** Okay. Hang on. All right.
17 Try not to lead so much.

18 **BY MR. MOYER:**

19 **Q** Did any -- let me rephrase the question.
20 Were there any police officers or government people
21 around when you saw this magazine?

22 **A** No.

23 **Q** Now, did you see him any time -- you saw him
24 in the picture, but other than in the picture and
25 other than today, did you see him any other times

1 after the robbery?

2 **A** No.

3 **Q** Not at any court hearings or anything like
4 that?

5 **A** No.

6 **MR. MOYER:** Okay. That's all I have for
7 now, Your Honor.

8 **THE COURT:** All right.

9 **MR. MOYER:** One moment please.. I'm sorry.

10 (Pause.)

11 Nothing else at this time, Your Honor.

12 **THE COURT:** All right. Cross.

13 **CROSS-EXAMINATION**

14 **BY MS. ROSS:**

15 **Q** You said you dialed 9-1-1. You hung up the
16 phone, didn't you, before talking?

17 **A** Yes, I did call, but they couldn't understand
18 me because they were speaking in English.

19 **Q** Okay. And then when 9-1-1 called back, they
20 spoke to your brother, correct?

21 **A** Yeah, they returned the phone call and my
22 brother answered.

23 **Q** And your brother was there translating for
24 you when the police arrived at the scene, correct?

25 **A** Yes.

1 Q Now, was your brother there during the
2 incident at the house?

3 A No.

4 Q And, uh, you stated that you had, uh, seen,
5 uh, the person around the neighborhood for sometime
6 before this incident occurred. Is that right?

7 A Yes.

8 Q Yet, when you talked to police, you said
9 nothing about having seen the person around before.

10 A Yeah, I mean, I've seen him once in a while,
11 not to many -- not in too many occasions.

12 Q On the night of the incident, you had been
13 drinking quite a bit, hadn't you?

14 A About six beers.

15 Q Would it surprise you that the officer
16 described you as grossly intoxicated?

17 A No, not too much.

18 Q Now, the investigator, Jarvis, came out to
19 see you like five, more like 10 days after the
20 incident, correct?

21 A Yes.

22 Q And at that time, you talked about the female
23 person who was there and identified Patricia Rice.

24 A Yes.

25 Q And you described her as a 50-year old

1 female, correct?

2 **A** No.

3 **Q** All right. So it's your testimony that you
4 didn't describe the other person there at the robbery
5 as a skinny black female about 50 years old?

6 **A** Yeah, that woman, yes.

7 **Q** In fact, you drove around and picked her out
8 in the area, in the neighborhood?

9 **A** Yes.

10 **Q** Now, at that time, you did not tell
11 Investigator Jarvis that you had seen the black male
12 who had robbed you in the area, did you?

13 **A** That what had happened or what?

14 **Q** At that time, you didn't change your
15 description of the black male who you said robbed you,
16 did you?

17 **A** No.

18 **Q** And you did not say I mean to say he was 50
19 just like the female?

20 **A** No, never.

21 **Q** All right. Now, after that time, Patricia
22 Rice was arrested. Were you aware of that?

23 **A** Yes.

24 **Q** And you were aware of that because the
25 officers have to keep you updated on what happens in

1 your case, correct?

2 **A** Yes.

3 **Q** And at that time, they told you that Bobby
4 Barton had been arrested as well.

5 **A** The officer told me that they were going to
6 arrest him.

7 **Q** All right. Now, after being told that they
8 were going to arrest him, you saw this "mug shot"
9 magazine?

10 **A** No, I seen it before, before they came.

11 **Q** You seen it before? What do you mean when
12 you say "when they came"?

13 **A** Okay. No, what happened was when they
14 arrested him, then I saw the picture of him. It was
15 showing that he was arrested.

16 **Q** Okay. And is this the picture you saw?

17 **A** Yes.

18 **Q** Was that around the time this magazine came
19 out in August? Around the time of the incident?

20 **A** No, this magazine has been around for a long
21 time.

22 **Q** Okay. But when you saw the picture in this
23 magazine, was it close to the time of the incident?

24 **A** I saw it, uh, when he was arrested. After he
25 was arrested.

1 Q All right.

2 A About two weeks.

3 Q Isn't this the same picture on the photo
4 lineup as this picture in this magazine?

5 A Yes.

6 MS. ROSS: I've got nothing further.

7 REDIRECT EXAMINATION

8 BY MR. MOYER:

9 Q Just a couple of quick followup questions.
10 When you saw that magazine, did you know Bobby
11 Barton's name when you saw the magazine?

12 A No. I recognize but I didn't know his name.

13 Q Okay. And can you read English?

14 A No, I understand a little.

15 Q When you looked at these pictures, you could
16 see the pictures, but could you read the names and the
17 other words on that magazine?

18 A No, I just seen but I couldn't read.

19 Q You saw the picture but you couldn't read any
20 words with it?

21 A Yes.

22 Q Okay. When you saw that magazine, did you
23 know he had been arrested yet?

24 A Yes.

25 MS. ROSS: That's been asked and answered.

1 BY MR. MOYER:

2 Q So you knew he had been arrested, but you
3 didn't know his name, right?

4 A Yeah, well, the officer told me that he was
5 arrested, but I didn't know the name.

6 MR. MOYER: Okay. That's all.

7 RECROSS-EXAMINATION

8 BY MS. ROSS:

9 Q Just one thing. You stated you found the
10 "mug shot" magazine with your brother, correct?

11 A Yes.

12 Q And did you talk to your brother about what
13 was in the magazine?

14 A No. I just said in my mind that I saw him.

15 Q And you stated you had seen him around the
16 neighborhood before, correct?

17 A Before.

18 Q You had seen that face before?

19 A Yes.

20 Q After seeing that face in "mug shot"
21 magazine, you didn't call the police and tell them
22 anything knew about your case, did you?

23 A No.

24 MS. ROSS: I've got nothing further.

25 THE COURT: Okay. You may step down. Thank

1 you.

2 **MR. MOYER:** Your Honor, I believe that's all
3 of the testimony I will have ---

4 **THE COURT:** Okay.

5 **MR. MOYER:** --- at this time.

6 **MS. ROSS:** We have one witness, an expert
7 witness to present at this time.

8 **THE COURT:** Okay.

9 **MS. ROSS:** Can we have a brief moment before
10 she goes?

11 **THE COURT:** Yes. Let's take about five
12 minutes, three minutes. How long do you
13 anticipate her testimony is going to be?

14 **MS. ROSS:** 15 or 20 minutes.

15 (WHEREUPON, a short recess is taken.)

16 **MS. ROSS:** We'll call Lori Van Wallendael.

17 **LORI VAN WALLENDael**

18 having first been sworn, testifies as follows:

19 **DIRECT EXAMINATION**

20 **BY MS. ROSS:**

21 **Q** Dr. Van Wallendael, what do you do?

22 **A** I'm an Associate Professor of Psychology at
23 the University of North Carolina at Charlotte.

24 **Q** Okay. And you are retained to be here today
25 by the defense, by me, is that correct?

1 **A** That is correct.

2 **Q** All right. Do you have an area of expertise
3 that you've been studying in your capacity as a
4 psychologist?

5 **A** Yes, I do.

6 **Q** What is that area?

7 **A** That area is eyewitness memory.

8 **Q** Okay. Have you written or published any
9 papers in that area?

10 **A** Yes, I have.

11 **Q** What would those papers be?

12 **A** Most recently, I've had chapters in Handbook
13 of, uh, Eyewitness Psychology, Psychology of Law
14 books. I've also published in peer-reviewed journals.

15 **Q** All right. Have you ever testified as an
16 expert in the area, uh, of psychology, specifically
17 witness identification and recollection?

18 **A** Yes, I have.

19 **Q** How many times have you actually testified in
20 that area?

21 **A** Probably about 20.

22 **MS. ROSS:** Uh, I would move that Dr.
23 Wallendael be recognized in the area of
24 eyewitness identification at this time.

25 **THE COURT:** Voir dire?

1 **MR. MOYER:** No, Your Honor. I will not
2 object for purposes of this hearing although I'm
3 not waiving whether I will or not at ---

4 **THE COURT:** You testified 20 times. Were
5 you qualified as an expert 20 times?

6 **THE WITNESS:** Yes.

7 **THE COURT:** And where were those?

8 **THE WITNESS:** North Carolina, South
9 Carolina, Georgia, District of Columbia, West
10 Virginia, I believe.

11 **THE COURT:** Okay. All right. Go ahead.

12 **BY MS. ROSS:**

13 **Q** All right. Uh, Dr. Van Wallendael, have you
14 had an opportunity to review the discovery in this
15 case?

16 **A** Yes, I have..

17 **Q** Also were you in the courtroom today when you
18 heard the testimony of Investigator King and Mr.
19 Perez?

20 **A** Yes.

21 **Q** Now, based on your review of the discovery
22 and listening to that testimony, do you have an
23 opinion as to the, uh, trustworthiness and the
24 reliability of witness identification, uh, in this
25 case?

1 **A** There is several factors in this case that
2 make me doubt the reliability of the identification in
3 this case.

4 **Q** Can you discuss those factors at this time?

5 **A** Sure. First, uh, the reports describe the
6 victim as being highly inebriated at the time of the
7 incident. Much as we don't like to see inebriated
8 people behind the wheel, the same kinds of effects
9 that make a person a poor driver can also make a
10 person a poor rememberer basically when they are under
11 the influence of alcohol. There are a number of
12 studies that show that people who are under the
13 influence of alcohol do not take in as much
14 information about a scene, uh, do not recollect and
15 really, uh, even encode the information as it is
16 happening. They are less likely to be able to provide
17 a good description and more likely to make a false
18 identification in a lineup situation.

19 **Q** All right. Is there anything else that would
20 make you question the reliability of this, uh,
21 identification?

22 **A** The witness was in, uh, a less than optimal
23 circumstance as most witnesses are in a situation.
24 There was certainly some threat to the victim's life
25 in terms of a knife and a threat with that knife.

1 Researchers and eyewitness memory often talk about
2 what we call the weapon focus effect which is
3 basically, uh, a very natural effect where a person
4 who is under threat is paying more attention to the
5 weapon and to trying to get out of the situation alive
6 basically than they are to the face of the
7 perpetrator. As a result, when there is a weapon
8 present, there is a decreased likelihood of a correct
9 identification and a greater likelihood of a false
10 identification.

11 Q All right. Now, you heard the testimony that
12 the, uh, victim spoke to law enforcement about 10 days
13 later or a week or so after the incident and then gave
14 a, uh, a better description of the female that was
15 there?

16 A Right.

17 Q Now, would the fact that he had no better
18 description of the male have any affect on your --

19 MR. MOYER: I would object as reliance on
20 facts not in evidence.

21 THE COURT: I thought she asked a question,
22 did he give them any new information.

23 MS. ROSS: I did ask the victim that
24 question.

25 THE COURT: Yeah. Go ahead.

1 BY MS. ROSS:

2 Q Did the fact that the victim later had a, uh,
3 more of one co-Defendant but not the other bring into
4 question the identification of this particular one of
5 Mr. Barton any more or less?

6 A Well, to someone who studies memory, it's not
7 surprising that he might be able to give a better
8 description of the person who was not, in fact,
9 holding him at knife point. But it also suggests
10 that, in fact, there was less attention being paid to
11 the male and less detail available to the victim's
12 memory.

13 Q Now, as far as the actual procedure of the
14 photo lineup that was presented, are there any
15 problems that you see with that that could create a
16 substantial likelihood of misidentification?

17 A Well, the major thing that I see is the fact
18 that the witness did have this prior exposure to mug
19 shot --

20 MR. MOYER: Your Honor, I would object to
21 this based on the fact that the prior exposure,
22 there was no state action involved at all. That
23 would not be something that the court would take
24 into consideration for purpose of this
25 determination.

1 **THE COURT:** Yeah. I'll keep that in mind.

2 Go ahead with your questioning.

3 **BY MS. ROSS:**

4 **Q** Okay. Uh, now as far as whether or not there
5 was state action involved and the victim seeing "mug
6 shot" magazine, would that exposure affect -- would
7 that have any affect on Mr. Perez picking Mr. Barton
8 out of -- this same mug shot out of a photo lineup?

9 **A** Yeah. First of all, the fact that there was
10 not state involvement or that this exposure to "mug
11 shot" magazine was not under any kind of a controlled
12 circumstance actually makes the situation worse. We
13 don't really know how long he looked at those photos
14 in the "mug shot" magazine or what he might have
15 discussed with his brother and so forth. All we know
16 is there was a prior exposure to that photo. We do
17 have a number of studies that suggest that if you look
18 at mug shots and you are exposed to a photo
19 previously, then you see that photo in a lineup later,
20 you are much more likely to have a sense of
21 familiarity with that photo and not necessarily to be
22 recognizing the perpetrator but to be recognizing the
23 prior exposure to the photograph.

24 **Q** Now, is there a name for that?

25 **A** We sometimes refer to it as mug shot effects.

1 We sometimes refer to it as what we call transference.
2 In general terms, what happens is we transfer a memory
3 from one setting to a idea of a memory from a
4 different context. You see the face. The face is
5 familiar. You think the fact is familiar because you
6 remember him as the perpetrator, but, in fact, you may
7 be remembering just that you've seen that photo
8 before.

9 **Q** All right. And, uh, Investigator King
10 testified that when he handed the photo lineup to Mr.
11 Perez, I believe he stated, uh, we prepared a photo
12 lineup. Was there anything suggestive about that
13 presentation of a photo lineup?

14 **A** There were a few things that were perhaps not
15 what you call best practices. One of the key things
16 is that typically the best practice for putting a
17 lineup together and the standard practice would be to
18 choose the photos based on the witness' description
19 initially. We tend to think of the witness' initial
20 description as probably the most accurate, the least
21 prone to being contaminated by additional information
22 or simply by forgetting.

23 So that initial description of a black male,
24 25 to 30, I believe is what I read in the report,
25 would normally be what you would populate the, uh,

1 lineup with. The problem, obviously, is if you did
2 that and your suspect is a man in his 50's, the
3 suspect is going to stand out like a sore thumb. What
4 might have been done is perhaps a mixture of photos
5 that matched the Defendant and photos that matched the
6 initial description. But given the exposure to "mug
7 shot" magazine in between, there probably isn't a lot
8 really that the officer could have done to have
9 alleviated that problem even if the lineup were
10 constructed a little differently.

11 Q All right. Now with the exposure to "mug
12 shot" magazine, would you expect a witness who sees a
13 perpetrator to contact law enforcement saying that
14 they seen them at the time of viewing a mug shot --

15 MR. MOYER: I would object to being outside
16 of the area of what she's an expert in.

17 THE COURT: Yeah. I think I'm going to have
18 to agree to that.

19 MS. ROSS: All right.

20 BY MS. ROSS:

21 Q Just viewing, uh, the testimony and the
22 discovery, can you give an opinion about whether there
23 is substantial likelihood of misidentification in this
24 case?

25 A I would say there is a much more -- a much

1 higher than usual probability of this identification
2 given the witness' state of intoxication and given
3 the, uh, exposure to "mug shot" magazine.

4 MS. ROSS: All right. I've got no further
5 questions.

6 CROSS-EXAMINATION

7 BY MR. MOYER:

8 Q So they are the two factors that you are
9 basing this on?

10 A Those are the main ones.

11 Q Okay. A couple of questions. You don't know
12 how intoxicated the victim was, do you?

13 A No.

14 Q Obviously -- I'm sorry. Obviously, you
15 weren't there?

16 A No.

17 Q You didn't meet with them. So you have no
18 idea really how much he drank or how intoxicated he
19 was.

20 A No, I only know what's in the report and what
21 he said here today.

22 Q Are you also aware that about a week after
23 the fact, he was able to correctly identify the female
24 who was with the Defendant in this incident. You
25 aware of that?

1 **A** Yes.

2 **Q** Okay. And just to make sure we're on the
3 same page with the facts, the Defendant and this
4 female walked up to the victim at night and after a
5 short conversation, the Defendant robbed the victim.
6 Those are the facts basically as you understood them?

7 **A** Yes. That's what I've read.

8 **Q** And as you understood those facts and what
9 you are basing your opinion on, the female basically
10 just stood there?

11 **A** Yes.

12 **Q** And the male had some interaction with the
13 victim and then robbed him?

14 **A** Yes, from what I understand.

15 **Q** He was actually able to correctly pick out,
16 while driving down the street, pick out the female who
17 had been with the Defendant that night, correct?

18 **A** Yes.

19 **Q** Okay. Now, you talked about -- All right.
20 As far as the, uh, -- as far as the photo lineup --
21 I'm sorry. As far as this "mug shot" magazine, do you
22 not find it somewhat compelling that someone who
23 happened to just look through a magazine with, I don't
24 know, maybe hundreds of photographs was able to see
25 the person who robbed him. Does that not lend some

1 credence to his identification?

2 **A** It depends on whether that photo was in some
3 way familiar from other aspects. As the victim
4 claims, he had seen this person in his neighborhood or
5 this person lives nearby. There might be some sense
6 of familiarity with the photo from other contexts.

7 **Q** And are you suggesting that a normal person
8 of normal intelligence would just pick somebody out
9 and accuse them of an Armed Robbery just because they
10 happen to know that person?

11 **A** Unfortunately, it happens all the time.

12 **Q** Okay. Uh, and now as far as what you
13 described as a better array of photographs that could
14 have been shown, obviously, you are not trying to say
15 that would have been better to have the defendant's
16 picture along with a group of 25-year-olds?

17 **A** No, definitely not.

18 **Q** And you also were not aware of what the prior
19 description was, are you?

20 **A** Uh, what I was told was just that it was a
21 black male, 25 to 30.

22 **Q** And that's based on a police report?

23 **A** Yes.

24 **Q** And are you aware that that description came
25 about through conversation between a non-Hispanic

1 **THE WITNESS:** Yes.

2 **THE COURT:** Is that right? All right. I
3 don't have anything else. Anything else? (No
4 response.)

5 All right. Thank you, ma'am. You can step
6 down. Can we release her from subpoena?

7 **MS. ROSS:** Yes. Well, I'd like to discuss
8 that.

9 **THE COURT:** Okay. All right. Anything
10 else?

11 **MS. ROSS:** Judge, I would just briefly
12 argue. Under Neil v. Biggers, the first test,
13 the first prong is what I see as being the more
14 state action aspect of the identification was the
15 action by the state unduly suggested. That's
16 where we got through State v. Moore, the
17 opportunity to view, degree of attention, the,
18 uh, accuracy of prior description, level of
19 certainty and length of time. Then there's --
20 those factors go through the second inquiry which
21 is whether under the totality of the
22 circumstances there is substantial likelihood of
23 misidentification. That doesn't have anything to
24 do with how Mr. Perez got "mug shot" magazine.

25 I did hear testimony that he had been

1 informed that someone else had been arrested. He
2 did get "mug shot" magazine afterwards. It was
3 the only other arrest in there for an armed
4 robbery. And it's also Patricia Rice. The other
5 one in there was the person that he had actually
6 picked out. There would be a natural inclination
7 to go to the one other armed robbery charge and
8 see that same picture once again. Mr. Perez said
9 he had seen--

10 **THE COURT:** Let me interrupt. Your argument
11 is that the in-court identification should not be
12 allowed because of suggestive out-of-court
13 issues, is that right?

14 **MS. ROSS:** Yes. I think that is true, but
15 then there is also a second inquiry whether due
16 process issues, whether there is a substantial
17 likelihood of misidentification. That's outlined
18 in State v. Turner, State v. Moore.

19 **THE COURT:** What about State v. Tisdall
20 where it is a non-governmental ---.

21 **MS. ROSS:** Right.

22 **THE COURT:** --- issue?

23 **MS. ROSS:** Here, I think the identification
24 process, whether it's governmental or not,
25 there's still a violation of due process there.

1 I think that -- we'd argue that regardless of the
2 state action, that would come in here.
3 Certainly, by using the same lineup that the
4 victim had been exposed to before. The same
5 picture.

6 THE COURT: All right. I'm not going to
7 find that this -- first of all, I'm going to find
8 that his exposure to the "mug shot" magazine,
9 which is not admitted, is not the result of
10 governmental action. Then, Dr. Van Wallendael's
11 testimony is that her only -- and I didn't get it
12 as being written in concrete, 30 percent of these
13 IDs are wrong. The way I understood it, 20
14 percent in a laboratory setting. She said the
15 estimate goes up 10 percent out of the
16 laboratory. So only 30 percent are wrong, if
17 that is correct.

18 So I'm going to find that the identification
19 made in this case was not corrupted by the
20 victim's exposure to "mug shot" magazine which
21 was not the result of the State's action. I'm
22 going to find that the lineup itself is
23 appropriate. I know that if they had, in fact,
24 done what the doctor suggested and put three
25 young men and three of the men who were in there

1 in the lineup, that would have been a big issue
2 for the defense. I think that covers it.
3 Anything else?

4 MS. ROSS: No.

5 THE COURT: Okay.

6 MS. ROSS: Not regarding this. There are
7 some other pretrial.

8 THE COURT: Okay. What are they? Let's get
9 it done. The jury is going to be back in 55
10 minutes.

11 MS. ROSS: All right. Well, Judge, I have a
12 motion to quash the indictment under Rule 3. It
13 wasn't indicted within 90 days of the Rules of
14 Criminal Procedure. Also, my client expressed
15 concern that the, uh, wording of the warrant that
16 led to the indictment by the officer suggested
17 that, uh, the victim, uh, identified Mr. Barton
18 before he, in fact, had been identified. So he
19 had an objection to the wording. It was unduly
20 suggestive. It didn't reflect the evidence in
21 the State's possession at that time.

22 THE COURT: Mr. Moyer?

23 MR. MOYER: As for the warrant itself, that
24 is not a matter that really should be addressed
25 by this court. Any potential error for that

1 **THE COURT:** Brief, non-argumentative.

2 **MS. ROSS:** Can't tell you that.

3 **THE COURT:** Judge Pyle used to just "Call
4 your first witness". He ever do that to you?
5 You were around about long enough.

6 **MR. MOYER:** Oh, yeah. Yeah. He's used to
7 let me give longer.

8 **THE COURT:** Yeah, cause we softened him up.
9 (WHEREUPON, the jury enters at approximately
10 2:46 p.m.)

11 **THE COURT:** All right. Ladies and
12 Gentlemen, welcome back. I hope you had a
13 pleasant lunch. It was a long lunch break. We
14 had some things to tend to which I think will
15 probably save time in the long run. But welcome
16 back.

17 Mr. Guirl, thank you for agreeing to serve as
18 foreperson.

19 As I told you, we are about ready to embark
20 on the first part of the trial. That is the
21 opening statements of the attorneys. Okay.

22 **MR. MOYER:** Thank you, Your Honor. May it
23 please the Court.

24 **THE COURT:** Yes, sir.

25 **MR. MOYER:** Mr. Foreman, Ladies and

1 Gentlemen of the jury, I just have a couple of
2 opening remarks to bring out to you before we
3 jump right into this trial, which we will hear in
4 just a couple of moments. As you've heard me
5 introduce myself earlier, my name is Mark Moyer.
6 I'm an Assistant Solicitor here in Greenville
7 County. My job is to represent the State in
8 criminal cases like the one that is before you
9 now.

10 You've heard the indictment read to you. You
11 know a little bit about it. You are here today
12 because on the night of July the 25th, the
13 allegations are that this defendant did rob a
14 young man by the name of Edwin Perez who is
15 seated on the back row. Robbed him, held a knife
16 against his throat and stole a wallet containing
17 \$500 worth of cash from him.

18 You are going to hear from Edwin Perez in
19 just a couple of minutes. You are going to hear
20 that Edwin was a 26-year old guy. He lives here
21 in Greenville County. You are going to hear he's
22 a hard-working guy. He works landscaping all day
23 out in the hot sun. You are going to hear that
24 the day this happened was a Friday night. Edwin
25 Perez had just been paid. He had a good wad of

1 cash. He had got his check cashed. He had \$500
2 in his wallet. You are going to hear that Edwin
3 did not have to work the following day. The
4 following day was a Saturday.

5 Like many young people, Friday night, he's
6 going to drink a few beers. You're going to hear
7 that he wasn't out at a bar. He wasn't in any
8 trouble. He wasn't out driving. He stayed at
9 his home, a trailer down on the southern end of
10 the county. He was having a few beers hanging
11 out at the trailer with his friends. About
12 midnight, his friends left. He went and hung out
13 outside the trailer finishing up his beer.
14 You're going to hear that that's when he got
15 robbed. He was all alone.

16 You're going to hear that two people
17 approached him. The testimony is going to be
18 that this defendant and another woman by the name
19 of Patricia Rice approached him and, after a very
20 brief conversation, you're going to hear that
21 this defendant pulled a knife, held it to Edwin's
22 throat and stole -- robbed him of his wallet and
23 \$500 cash that was in the wallet.

24 You're going to hear testimony that Edwin had
25 seen these people before, especially the female,

1 Ms. Rice. Uh, there was a neighborhood behind
2 his, a shortcut through Mr. Perez's trailer park
3 where people from this neighborhood would often
4 walk to get to a convenience store that's over on
5 White Horse Road. You're going to hear that Mr.
6 Edwin Perez has seen these people several times.

7 You are going to hear that about a week
8 later, this investigator, Investigator Jarvis,
9 got Mr. Perez and took him out in his car and
10 said let's see if we can find that woman who was
11 there when you got robbed. You're going to find
12 that they found her. You are going to find that
13 Investigator Jarvis began speaking to this woman,
14 Patricia Rice. She told Investigator Jarvis
15 right then and there that the person who robbed
16 Mr. Perez was this defendant, Bobby Barton.

17 You are also going to hear that several
18 months later, Edwin Perez actually identified
19 this defendant in a photo lineup. You're going
20 to hear that he's going to be able to tell you
21 that he is absolutely sure that this defendant is
22 the person that held that knife to his throat and
23 robbed him.

24 I anticipate this to be a relatively short
25 case. The state, we have about six witnesses to

1 call, all of whom will be fairly short. I will,
2 uh, tell you this by way of warning, Mr. Perez is
3 going to require an interpreter when he
4 testifies. He will be the first witness. I will
5 warn you, it will be a bit tedious,
6 unfortunately. But he will be the only witness
7 who will require, uh, an interpreter.

8 Now, at the end of this case, I'll have a
9 chance to talk to you again. At that time, I
10 will have the opportunity to argue to you why the
11 evidence and the testimony you heard in this case
12 points beyond any reasonable doubt that this
13 defendant is the person who robbed Edwin Perez.
14 But for now, all I ask you is to listen closely
15 to all this testimony, use your common sense and
16 your good judgement to weigh that evidence and,
17 then, at the end of the case, do justice. Thank
18 you.

19 **MS. ROSS:** Thank you. May it please the
20 Court.

21 **THE COURT:** Yes, ma'am.

22 **MS. ROSS:** Ladies and Gentlemen of the jury,
23 my name is Susannah Ross. I represent Bobby
24 Barton who is sitting right over there. Now,
25 he's been armed -- he's been charged with Armed

1 Robbery, and that is a serious crime in the State
2 of South Carolina. He's pled not guilty to that
3 crime. Now, the State has the burden of proving
4 him guilty beyond a reasonable doubt before he's
5 guilty of that crime. He's not guilty. He's
6 pled not guilty because he's not guilty. I would
7 ask you to watch the evidence the State presents
8 in this case.

9 I can tell you right now this is an
10 eyewitness case. That's all it's about. Once
11 the State went and picked out Pat Rice, Patricia
12 Rice, she gave a statement and she named Bobby
13 Barton. That's why Bobby Barton is here today
14 because she named him. Month, months later, the
15 victim picked out Bobby Barton from a lineup.
16 This identification procedure was very tainted by
17 prior exposure of the victim to Mr. Barton and
18 that very same photograph of Mr. Barton that was
19 shown to him in the eyewitness lineup months and
20 months later. Now, as far as that, the State
21 stops. That is the extent of evidence that they
22 present -- that I suspect they will present to
23 you here today.

24 Eyewitness testimony is not everything. It
25 can be very tainted under the circumstances. I

1 ask you to look for those circumstances and at
2 that those circumstances as you hear the case
3 before you today. In looking towards that, know
4 that the State has to prove guilt beyond a
5 reasonable doubt. They are not going to be able
6 to do that today. There's not the other evidence
7 there that needs to be there for you to find Mr.
8 Barton guilty of a crime. Thank you.

9 **THE COURT:** Okay.

10 **MR. MOYER:** Your Honor, at this time, the
11 State would call Mr. Edwin Perez to the stand and
12 also Ms. Teresa Sampson as his interpreter.

13 **THE COURT:** Okay. Place you under oath
14 first and then Mr. Perez.

15 **THE CLERK:** Do you solemnly swear that you
16 will actively interpret the language requested in
17 this courtroom of the witness without additions
18 thereto or detractions therefrom or any other
19 amendments of your own interpretation so help you
20 God?

21 **THE INTERPRETER:** Yes, I do.

22 **EDWIN PEREZ**

23 having first been sworn, testifies as follows:

24 **THE CLERK:** Please have a seat.

25 **DIRECT EXAMINATION**

1 (WHEREUPON, the following answers are given by the
2 interpreter.)

3 BY MR. MOYER:

4 Q Mr. Perez, state your full name.

5 A Edwin Perez, Perez.

6 Q How old are you?

7 A 26 years old.

8 Q Are you married?

9 A No.

10 Q What kind of work do you do?

11 A Landscaping.

12 Q How long have you been doing landscaping
13 work?

14 A Seven years.

15 Q You also -- you work on lawn mowers some
16 also?

17 A No.

18 Q Some of the lawn mowers that belong to the
19 landscaping business, do you work on some of those?

20 MS. ROSS: Objection. Asked and answered.

21 THE COURT: Go ahead.

22 THE WITNESS: No.

23 BY MR. MOYER:

24 Q Okay. Now, let me draw your attention to the
25 early morning hours of July the 25th, 2009.

1 **A** I went to work on that day.

2 **Q** Okay. Where did you live on that day?

3 **A** [REDACTED].

4 **Q** And what road is that on?

5 **A** [REDACTED] [sic].

6 **Q** On [REDACTED]?

7 **A** Yes.

8 **Q** And can you show that on a map?

9 **A** Yes.

10 **(WHEREUPON, State's Exhibit 2 is marked for**
11 **identification purposes.)**

12 **BY MR. MOYER:**

13 **Q** Let me show you State's Exhibit number 2.

14 Can you -- take a look at that for a minute. Can you
15 recognize that?

16 **A** Yes.

17 **Q** And what is that a picture of?

18 **A** Where -- it's a picture of where I live, my
19 trailer.

20 **Q** Okay. Is this a true and accurate
21 representation of the area where you lived on July
22 25th, 2009?

23 **A** Yes.

24 **MR. MOYER:** At this time, I move to have
25 State's Exhibit number 25 [sic] entered into

1 evidence.

2 MS. ROSS: No objection.

3 THE COURT: All right. Without objection.

4 COURT REPORTER: He said State's Exhibit 25.

5 It's 2.

6 THE COURT: State's Exhibit 2.

7 MR. MOYER: Is that what I --

8 THE COURT: You said 25.

9 THE INTERPRETER: You said --

10 MR. MOYER: Did I? I'm sorry.

11 (WHEREUPON, State's Exhibit 2 is admitted into the
12 record.)

13 BY MR. MOYER:

14 Q Okay. Mr. Perez, would you please step down
15 and point out to the jury the trailer where you lived
16 July 25th, 2009.

17 A Right there.

18 Q Okay. All right. We'll refer to it again
19 later, but thank you. You may have a seat. Now, this
20 trailer where you lived, is that in Greenville County?

21 A Yes.

22 Q How long have you lived there?

23 A Seven years.

24 Q Who did you live there with?

25 A With two brothers.

1 Q Okay. And that's who you lived with July
2 25th of 2009?

3 A Yes.

4 Q Okay. Is that the night you were robbed?

5 A Yes.

6 Q Did this happen there at the trailer?

7 A Behind my trailer.

8 Q Okay. And what time -- was it during the
9 daytime or in the nighttime when this happened?

10 A Night.

11 Q Tell us what you were doing that night before
12 you got robbed.

13 A I was in the back just drinking some beers.

14 Q You remember what day of the week this was?

15 A Friday.

16 Q Had you worked that day?

17 A Yes.

18 Q Did you have to work the next day, Saturday,
19 or were you going to be off?

20 A Yes, but I didn't go.

21 Q But you didn't go. Okay. Did your brother
22 and friends stay there for the whole night or did they
23 leave at some point?

24 A My brothers stayed there because they lived
25 there, but inside. They were inside.

1 Q Okay. So your brother went inside?

2 A Yes.

3 Q Had there been anybody else there having a
4 drink with you?

5 A My brother -- my brother and other friend.

6 Q Okay. Did your other friend stay there or
7 did he leave too?

8 A He left.

9 Q Okay. So you were there by yourself?

10 A Yes.

11 Q Now, can you identify today the man who
12 robbed you?

13 A Yes.

14 Q Do you see him here in the courtroom?

15 MS. ROSS: Judge, I object.

16 THE INTERPRETER: Yes.

17 THE COURT: Same ruling. Go ahead.

18 BY MR. MOYER:

19 Q Okay. Would you please point him out?

20 A He's over there.

21 Q Is it the man in the blue suit? I'm sorry.
22 Blue shirt?

23 A Yes.

24 Q Okay. Now, uh, tell us how he -- how did he
25 rob you? How did it come about that you got robbed?

1 A I was outside. All of a sudden, he came. He
2 pushed me down with a pocketknife. He took my wallet.

3 Q Okay. Did you see the knife?

4 A No, because he put it right here.

5 Q Tell us what you mean by "here". Against
6 your neck?

7 A Yes, right here.

8 Q So if you didn't see the knife, how do you
9 know he had a knife?

10 A I felt it.

11 Q Did the knife cut you?

12 A No.

13 Q When you felt the knife against your throat,
14 how did that make you feel?

15 A I got really scared.

16 Q And, uh, did -- when he walked -- when he
17 came up to you, did he rob you right away? Was there
18 a period -- was he there for a minute or two before he
19 robbed you?

20 A He came. He knocked me down. He pushed me
21 down to the floor. Then, uh, I yell and then he took
22 my wallet and he left.

23 Q Okay. Now, where was your wallet?

24 A On that side, on the right side.

25 Q In your pocket?

- 1 **A** Yes.
- 2 **Q** Your front pocket or your back pocket?
- 3 **A** The back.
- 4 **Q** All right. Now, had you been paid that day?
- 5 **A** Yes.
- 6 **Q** And you had money?
- 7 **A** Yes, 500.
- 8 **Q** Was that in your wallet?
- 9 **A** Yes.
- 10 **Q** Uh, now, how did he get the wallet from you?
- 11 **A** He took his hand inside my pocket.
- 12 **Q** What did he do after he got the wallet away
- 13 from you?
- 14 **A** I yell. He ran.
- 15 **Q** He ran and you yelled?
- 16 **A** Uh-huh.
- 17 **Q** Now, was anyone with him when he came up?
- 18 **A** Yes, a girl. A lady.
- 19 **Q** Did she walk up there with him?
- 20 **A** She came very slowly. Then she told me,
- 21 "He's your friend. He's not going to rob you."
- 22 **Q** Okay. And, uh, that took place before he
- 23 robbed you?
- 24 **A** No, after he ran, she told me that.
- 25 **Q** Okay. And then she left? After, uh, --

1 after he ran, did she leave as well?

2 **A** Yeah, she start walking slowly and she was
3 just telling me those things as she was walking away.

4 **Q** Okay. What did she do while the robbery was
5 taking place?

6 **A** She was just standing there.

7 **Q** Okay. She walked up to you with this
8 defendant before the robbery?

9 **A** Yes, both of them came close to me.

10 **Q** Okay. Did they stand there and talk to you
11 before they robbed you?

12 **A** Yeah. They were standing there.

13 **Q** How long were they standing there before they
14 robbed you?

15 **A** About a minute. One minute.

16 **Q** Okay. Did you recognize this woman who was
17 with the Defendant who robbed you?

18 **A** Yes.

19 **Q** How did you recognize her?

20 **A** Once in a while, she used to pass by.

21 **Q** Okay. And she would pass through the trailer
22 park?

23 **A** Yeah, nearby.

24 **Q** Did you know her name?

25 **A** No.

1 Q Had you ever spoken to her as far as you
2 know?

3 A No, just I've seen her.

4 Q Okay. Now, can you show us on this map where
5 she used to walk.

6 A Like back here on that road.

7 Q Can you point it out for us again? Okay. Is
8 there a trail?

9 A Yes.

10 Q Where does the trail go?

11 A It goes all the way to here.

12 Q Over those railroad tracks?

13 A Yes, the railroad tracks.

14 Q Over to this neighborhood on the other side
15 of the railroad track?

16 A Yeah. All the way to this corner right here.

17 Q Okay. Thank you. You can have a seat. Now,
18 how about the Defendant? Had you ever seen him before
19 the night you got robbed?

20 A Once in a while.

21 Q Okay. So how many times -- did you see him
22 as many times as you had seen her?

23 A No, I used to see the woman more, more often.
24 She used to pass by more often and him not so much.

25 Q Any idea how many times you had seen him?

1 A About twice. I seen him about twice.

2 Q Would it be in the same area, around that
3 shortcut?

4 A Yeah, this same shortcut.

5 Q What did you do after you arrived and the man
6 and woman ran away?

7 A I called the police.

8 Q Were you able to talk to the police?

9 A No. They couldn't understand. I hang up.

10 Q I'm sorry.

11 A I hang up. Then they called me back.

12 Q Okay. When they called back, who spoke to
13 the police?

14 A My brother.

15 Q Did you wake your brother up?

16 A Yes.

17 Q Were you the only person outside when this
18 robbery took place?

19 A Yes.

20 Q Just you, the Defendant and this woman?

21 A Yes.

22 Q Did the officer come to your trailer?

23 A Yes. He arrived.

24 Q Did this officer speak Spanish?

25 A No.

1 Q How did you talk to him?

2 A My brother interpreted for me.

3 Q Okay. Now, the night this, uh, -- all right.

4 A week or so later, did you meet with this detective,

5 Detective Jarvis?

6 A Yes.

7 Q Were you able to talk to him?

8 A With him?

9 Q Yes.

10 A Yes. Yeah, he asked me to, uh, go and see if

11 I see that lady that I knew.

12 Q So he speaks Spanish?

13 A Yes.

14 Q All right. So did you go for a ride with

15 this police officer?

16 A Yes.

17 Q You were going out to see if you could find

18 this woman?

19 A Yes.

20 Q While you were with the officer in his --

21 were you in his police car?

22 A We, uh, saw her. She got in a car and we

23 followed them.

24 Q You saw her -- when you were out with the

25 police officer, did you see the woman who was with the

1 Defendant?

2 **A** Yes.

3 **Q** Did you tell Investigator Jarvis that that
4 was the woman who was with the man who had robbed you?

5 **A** Yes.

6 **Q** You saw her get in the car you said?

7 **A** Yes, she got in the car.

8 **Q** And the police stopped the car?

9 **A** We follow them first for a while.

10 **Q** You remember this investigator going over --
11 did you see him go over and talk to her?

12 **A** Yes.

13 **Q** Did you stay in the police car?

14 **A** Yes.

15 **Q** Were you later shown a photographic lineup so
16 you could identify the person who robbed you?

17 **A** Yes.

18 **Q** This was in January of 2010?

19 **A** Yes.

20 **Q** Okay. Where did you go to look at this
21 photographic lineup?

22 **A** Over there. Just down there.

23 **Q** To the police station?

24 **A** Yes.

25 **Q** Could the police officer you met with on this

1 day, could that police officer speak Spanish?

2 **A** No.

3 **Q** How were you able to have a conversation with
4 him?

5 **A** I was with my brother.

6 **Q** Okay. And your brother speaks English?

7 **A** Yes.

8 **Q** Did he help you to understand what the police
9 was saying?

10 **A** Yes.

11 **Q** Now, I'm going to show you what's been marked
12 as State's Exhibit 1.

13 **A** Yes.

14 **Q** I want you to take a look at that and tell me
15 if that's the photographic -- the photographs you were
16 shown by the officer January of 2010?

17 **A** Yes.

18 **Q** Okay. And, uh, are you able -- is your
19 signature on that?

20 **A** Yes.

21 **Q** And did you make any other marks on that
22 document?

23 **A** Yes, sir.

24 **Q** You made the circle?

25 **A** Yes.

1 Q Does it look the same essentially now as it
2 did when you were shown that photo lineup in January
3 of 2010?

4 A Yes.

5 Q You don't see anything changed on it?

6 A No.

7 MR. MOYER: Your Honor, at this time, we
8 would have State's Exhibit 1 entered into
9 evidence.

10 THE COURT: Subject to the previous
11 objection.

12 (WHEREUPON, State's Exhibit 1 is admitted into the
13 record.)

14 BY MR. MOYER:

15 Q Mr. Perez, when the officer handed that
16 photographic lineup to you, did he ask you to see if
17 you could recognize anybody?

18 A Yes.

19 Q All right. When you looked at that
20 photographic lineup, did you recognize anybody?

21 A Yes.

22 Q And what, uh, what did you, uh, -- what did
23 you recognize when you looked at that photographic
24 lineup?

25 A I recognized him right away from the time of

1 the robbery.

2 Q Okay. So you recognized the person who
3 robbed you?

4 A Yes.

5 Q Did you tell the officer who it was?

6 A When they asked me?

7 Q Yes. Did you point out to the officer and
8 show him which person you picked out?

9 A Yes.

10 Q Okay. And, uh, what did the officer ask you
11 to do?

12 A To put a circle around it.

13 Q Did you sign it also?

14 A Yes, and to sign it.

15 Q Okay. I'm going to ask you to step down
16 again and we'll show the jury and ask you to, if you
17 could, show the jury which of the pictures you pointed
18 out.

19 A Yes, the one with the circle.

20 Q Okay. Thank you. Please have a seat again.
21 When you looked at those photographs, did you look at
22 all the pictures carefully?

23 A Yes.

24 Q Were you sure that he was the one who robbed
25 you, absolutely sure?

1 A Yes.

2 Q Did the detective influence your decision at
3 all or did you pick them out on your own?

4 A I saw it.

5 Q Okay. Now, I'm going to ask you a few more
6 questions about the night that you got robbed. When
7 this happened, this happened at night, didn't it?

8 A Yes.

9 Q Was there enough light around in order for
10 you to be able to see his face well enough to
11 recognize him later?

12 A Yes.

13 Q What kind of light was there that enabled you
14 to see him?

15 A There was a small light, but it was well lit.

16 Q There was a small light on your trailer or
17 street light or what?

18 A To the right. On the right side of the
19 trailer. Yes, a street light. No, right next to the
20 trailer.

21 Q You could see his face well enough to
22 recognize him later?

23 A Yes.

24 Q Now, when he robbed you, you already
25 described that he came close enough to take your

1 wallet out of your pocket.

2 **A** Well he push me down.

3 **Q** He pushed you down. So he was very close to
4 your face?

5 **A** Yes.

6 **Q** He was close enough that he was holding the
7 knife next to your throat?

8 **A** Yes.

9 **Q** So his face was right next to yours?

10 **A** Yes.

11 **Q** Now, did the beer you were drinking that
12 night make you too intoxicated to remember what the
13 person looked like?

14 **A** No.

15 **Q** Okay. And you didn't have any trouble
16 picking out the female later, did you?

17 **A** Yeah, I know. I knew that woman, I mean,
18 I've seen that woman.

19 **Q** Same thing, you've seen him too, right?

20 **A** Yes, once. Once, I think.

21 **Q** The night this happened, how old did you
22 think the Defendant was?

23 **A** About 30 or 40.

24 **Q** And you remember the officer -- you remember
25 the officer -- when the officer was asking you to

1 describe him, do you remember -- is that what you
2 tried to tell the officer as far as how old he was?

3 **A** Yes.

4 **Q** Okay. And you weren't able to speak to this
5 officer --

6 **MS. ROSS:** Your Honor, I would object to the
7 leading at this point.

8 **BY MR. MOYER:**

9 **Q** I'll retract that question. When you spoke
10 to the officer the night of the robbery, did that
11 officer speak Spanish?

12 **A** No.

13 **Q** So you had to communicate using your brother
14 as an interpreter?

15 **A** Yes.

16 **Q** Okay. Now, after the night of the robbery,
17 did you, uh, ever see or speak to the woman who was
18 with the robber at a later time?

19 **A** No.

20 **Q** Just the night that she was arrested?

21 **A** Yes.

22 **Q** When you were with Investigator Jarvis?

23 **A** Yes, that day.

24 **Q** But you didn't talk to her that day?

25 **A** No.

1 Q Now, did you see the Defendant again after
2 that day?

3 A No.

4 Q Okay. Did you see any pictures of him after
5 that day?

6 A I saw him after he was arrested.

7 Q Tell us about the picture that you saw.
8 Where did you see it?

9 A We found this paper where there were a lot of
10 pictures in it. We found it on the floor.

11 Q Found it on the floor of what?

12 A On the grass. Since I cut grass, I saw it on
13 the grass.

14 Q Okay. And did you look through that
15 magazine?

16 A Yes.

17 Q And this magazine, you remember the name of
18 it?

19 A No.

20 Q Does "mug shot" magazine sound right?

21 A Yeah, I think so.

22 Q That magazine, did it have like a whole bunch
23 of different pictures in it?

24 A Yes.

25 Q Maybe hundreds of pictures?

1 A Yeah, more.

2 Q You looked through that magazine?

3 A Yes.

4 Q Was this maybe a few weeks after you got
5 robbed?

6 A I think after he was arrested.

7 Q So that was a few weeks after you got robbed?

8 A Yeah, because when I got robbed, I'm not
9 quite sure how long did it pass before.

10 Q Okay. And when you looked through that
11 magazine, you saw a picture of this defendant in
12 there?

13 A Yes.

14 Q Okay. When you saw his picture, were you
15 sure that was him?

16 A Yes.

17 Q Now, can you read -- let me retract that
18 question. When you were looking through that
19 magazine, did you know the name of the person?

20 A No.

21 Q At that time, you didn't know his name?

22 A No.

23 Q Can you read English?

24 A No.

25 Q All these pictures in that magazine, you

1 couldn't read their names or you couldn't read what
2 charges were by the names?

3 **A** I mean, a little bit but not too much.

4 **Q** Mainly, you were just looking at the
5 photograph?

6 **A** Yes.

7 **Q** Now, Mr. Perez, do you understand how
8 important it is that you correctly pick out the person
9 who did this to you?

10 **A** Yes.

11 **Q** Okay. You know how serious this is?

12 **A** Yes.

13 **Q** And, uh, once again, you have picked out this
14 defendant as the person who robbed you. Are you
15 absolutely sure that that man seated over there is the
16 person who robbed you?

17 **A** Yes.

18 **Q** Please answer any questions.

19 **CROSS-EXAMINATION**

20 **BY MS. ROSS:**

21 **Q** Now, Mr. Perez, the night of the incident,
22 your brother was there in the trailer, correct?

23 **A** Yes, inside.

24 **Q** Were both brothers inside or just one?

25 **A** Both of them were inside.

1 Q And someone called 9-1-1 and hung up the
2 phone.

3 A Me.

4 Q And then immediately, 9-1-1 called back,
5 correct?

6 A Yes.

7 Q At that point, one of your brothers spoke to
8 the 9-1-1 operator, correct?

9 A Yes.

10 Q And your brother was actually talking to you
11 and translating at the time you spoke to the 9-1-1
12 operator, correct?

13 A Yes.

14 Q Now, your brother understands Spanish and can
15 translate what you say, correct?

16 A Yes.

17 Q And the night of this incident, you describe
18 a 25 to 30-year-old black male as the person who
19 robbed you?

20 A No, I said between 30 and 40.

21 Q Now, did the officer at the scene, was he
22 speaking Spanish with you?

23 A He spoke in English, but my brother was
24 interpreting for me.

25 Q So your brother who speaks English and

1 Spanish was interpreting, correct?

2 **A** Yes.

3 **Q** Now, you said you were outside, you weren't
4 inside drinking beer that night?

5 **A** Yes.

6 **Q** And this was midnight or so?

7 **A** Yeah, around 11:00 or midnight, somewhere
8 around there.

9 **Q** You said you had your wallet with all your
10 cash, all the money you owned in your pocket outside
11 that night?

12 **A** Yes.

13 **Q** Now, did your trailer have a lock on it?
14 Could you lock the door to your trailer?

15 **A** Yes.

16 **Q** Now, your trailer has sort of decks at the
17 front and the back, correct?

18 **A** Yeah, concrete.

19 **Q** Are they on the ground or are they raised up
20 where the door is?

21 **A** On the floor where the grass is.

22 **Q** Okay. Now, uh, you stated that you were
23 pushed down, is that correct?

24 **MR. PEREZ:** Sí.

25 **BY MS. ROSS:**

1 Q And you stated that you didn't see a weapon
2 but a knife was held to your throat?

3 A Yes.

4 Q All right. Now, there was a woman there ---

5 A Yes.

6 Q --- who you later picked out with
7 Investigator Jarvis, correct?

8 A Yes.

9 Q And you are aware that she was arrested as
10 being part of this robbery against you, right?

11 A Yes.

12 Q You were also aware that after her arrest,
13 the man was arrested as well, correct?

14 A Yes, they told me. The police officer told
15 me.

16 Q Was this after Ms. Rice was arrested, the
17 woman you picked out?

18 A Yes.

19 Q So you knew that along with Ms. Rice, another
20 suspect, who was a male, was arrested in your case?

21 A Yeah, because she was the one who said that
22 she knew who had robbed me.

23 Q All right. And you knew this because the
24 police told you that because you were the victim?

25 A Yes.

1 Q And the police have to keep the victim
2 informed of the status of the case?

3 A Yes.

4 Q Now, you knew this when you took a look at
5 this "mug shot" magazine?

6 A Yes.

7 Q And on page 8 of this "mug shot" magazine,
8 there is a picture of Patricia Rice?

9 A Yes.

10 Q And you saw that before when you looked at
11 "mug shot" magazine?

12 A When she was arrested, she was put on that
13 magazine.

14 Q And you suspected that the other person that
15 she picked out would be in the magazine as well?

16 A Yes.

17 Q And on page 3, it is Bobby Barton?

18 A Yes.

19 Q Are you aware that he was the only other
20 person in this magazine from Greenville charged with
21 Armed Robbery?

22 A No.

23 Q Now, you said that you don't read English,
24 correct?

25 A No.

1 Q But your brother does, doesn't he?

2 A Yes.

3 Q When you looked at this magazine, he looked
4 at it as well, didn't he?

5 A Yes.

6 Q And y'all -- you discussed it, correct?

7 A Yes.

8 Q Now, a week after the incident, I just want
9 to ask you about meeting with Investigator Jarvis.

10 A Yes.

11 Q Now, at that point, you had, uh, -- you told
12 him you had seen the women involved in the incident,
13 correct?

14 A Yes.

15 Q And he could speak Spanish?

16 A Yes.

17 Q Yet, you said nothing about seeing the man
18 there?

19 A No.

20 Q And you said nothing about changing, giving a
21 more detailed description of the man there?

22 A No.

23 Q Now, it wasn't until January, about five
24 months later that you looked at this photo lineup.

25 A Yes.

1 Q At that point, could Investigator King speak
2 English -- I mean, Spanish?

3 A You mean the one where I went to see, no.

4 Q And your brother was interpreting then?

5 A Yes.

6 Q And at that point, you picked out this
7 photograph, right?

8 A Yes.

9 Q Now, isn't that the exact same photograph as
10 this one from "mug shot" magazine that you had seen
11 earlier?

12 A Yes.

13 Q You can see the white hair on the top in the
14 center there?

15 A Yes.

16 Q Now, at that time, you did not tell
17 Investigator King that you had seen the picture
18 before, did you?

19 A No.

20 MS. ROSS: I've got no -- I've got no
21 further questions.

22 THE COURT: Any redirect?

23 MR. MOYER: Just a couple of questions.

24 REDIRECT EXAMINATION

25 BY MR. MOYER:

1 Q Now, uh, when you saw that "mug shot"
2 magazine, are you the one who picked him out of the
3 magazine?

4 A Yes.

5 Q You are the one who saw him in the magazine,
6 not your brother?

7 A Yeah, it was me.

8 Q In fact, your brother didn't see him the
9 night of the robbery, did he?

10 A No.

11 Q He wasn't there?

12 A No.

13 Q Before you saw the man's picture in that
14 magazine, did your brother read all the names of the
15 people in the magazine?

16 MS. ROSS: Objection. He doesn't know what
17 his brother did or didn't do.

18 THE COURT: Wait --

19 MR. MOYER: No, no. Let me rephrase the
20 question.

21 THE COURT: Okay.

22 BY MR. MOYER:

23 Q Before you saw the Defendant's picture in the
24 "mug shot" magazine, did your brother read out loud to
25 you the names of all the people in the magazine?

1 **A** No.

2 **Q** Before you saw the Defendant's picture in the
3 "mug shot" magazine, did your brother read what all
4 the different criminal charges were in the book?

5 **A** No.

6 **Q** So you saw him and then told your brother?

7 **A** Yes. Yeah.

8 **Q** Thank you.

9 **MR. MOYER:** I have noth --

10 **MS. ROSS:** Just --

11 **MR. MOYER:** I'm sorry.

12 **MS. ROSS:** Just one more thing.

13 **RECROSS-EXAMINATION**

14 **BY MS. ROSS:**

15 **Q** Uh, when did you tell the Solicitor that you
16 had seen the picture in "mug shot" magazine?

17 **A** No, I didn't tell him.

18 **Q** Did you tell the police officers or anyone
19 from the State?

20 **A** No.

21 **MR. MOYER:** Just one quick followup.

22 **REDIRECT EXAMINATION**

23 **BY MR. MOYER:**

24 **Q** You told us that the first time we met with
25 you, didn't you? When we met with you, didn't you

1 tell us --

2 **A** Yes, once I -- you came with Monica.

3 **Q** And it was the first time you met with us?

4 **A** Yes.

5 **Q** Okay. Thank you. Nothing.

6 **THE COURT:** Okay. You can step down.

7 **MR. MOYER:** The State would call

8 Investigator Tracy King.

9 **TRACY KING**

10 having first been sworn, testifies as follows:

11 **DIRECT EXAMINATION**

12 **BY MR. MOYER:**

13 **Q** All right. Would you please state your full
14 name?

15 **A** Alvin Tracy King.

16 **Q** Where do you work?

17 **A** Greenville County Sheriff's Office.

18 **Q** How long have you been in law enforcement?

19 **A** 15 years.

20 **Q** Has that all been with Greenville County
21 Sheriff's Office?

22 **A** It has.

23 **Q** And what is your position?

24 **A** I work in the Armed Robbery Unit.

25 **Q** How long have you been in investigations with

1 the Greenville County Sheriff's Office?

2 **A** Ten years.

3 **Q** Now, did you conduct the photographic lineup
4 display that was used in this case?

5 **A** I did.

6 **Q** When did you do that?

7 **A** That was on January the 8th of this year.

8 **Q** Did you put that photographic lineup
9 together?

10 **A** I did.

11 **Q** How many photographs were displayed?

12 **A** Six photos.

13 **Q** Was this defendant included in the lineup?

14 **A** He was.

15 **Q** Where was his picture in that lineup?

16 **A** He was positioned in the lower center of the
17 six, commonly known as the number five position.

18 **Q** The photograph that you got was taken on what
19 date?

20 **A** It was taken on his arrest date of 8/4 of
21 '09.

22 **Q** Okay. And that was from when he got arrested
23 in this actual case?

24 **A** That's correct.

25 **Q** Now, the other five people in this lineup,

1 were they all similar in physical description to the
2 Defendant such as sex, race, uh, age, facial hair and
3 so forth?

4 **A** Yes, sir.

5 **Q** And who did you show the photo lineup to?

6 **A** To Mr. Edwin Perez.

7 **Q** Where did this take place?

8 **A** In my office in the basement of the Law
9 Enforcement Center.

10 **Q** Now, had you had any participation in this
11 case prior to showing this lineup?

12 **A** No, sir.

13 **Q** Did you have any participation after that
14 day?

15 **A** No.

16 **Q** How did you get involved?

17 **A** I was notified by Investigator Jarvis that he
18 was out of the office, he was home sick on this
19 particular day, and that the victim was scheduled to
20 come into the office for a photographic lineup.

21 **Q** Other than that conversation, were you aware
22 of any details of this case?

23 **A** No.

24 **Q** You don't speak Spanish now, do you?

25 **A** No.

1 Q So how -- you communicated with Mr. Perez
2 through a brother of his, is that right?

3 A Yes, sir.

4 Q Now what did you tell Mr. Perez through his
5 brother before showing him the lineup?

6 A I advised him that I had put together six
7 photos. I advised him if he recognized anybody in
8 these photos to point them out to me and to advise me
9 how he knew them. I also advised him that he didn't
10 have to point anybody out. He didn't have to feel
11 pressure to pick anybody.

12 Q Tell us how you showed that photo lineup to
13 Mr. Perez?

14 A Once I explained this to him through his
15 brother, I handed the photo lineup to him upside down
16 with the photos facing downward to where he couldn't
17 see them. I advised him, when he was ready, to flip
18 them over, look them over and if he recognized anybody
19 to point them out and tell me why.

20 Q All right. So did you in anyway exert any
21 pressure on Mr. Perez to pick somebody out of the
22 lineup?

23 A No, sir.

24 Q Did you indicate to him that he had to pick
25 somebody out of the lineup or that he didn't have to?

1 **A** No, sir.

2 **Q** Did you in any way influence his decision as
3 to which photograph he ended up choosing out of that
4 lineup?

5 **A** I did not. No.

6 **Q** Tell us what happened when you gave the photo
7 lineup to Mr. Perez.

8 **A** After I handed the photo lineup to him, like
9 I said, it was faced down. Mr. Perez turned it over.
10 And again, due to the fact that I couldn't understand
11 what he was saying, I watched him as he went over the
12 photo lineup. I could see his eyes go from left to
13 right starting at the top. When he got to the bottom
14 row, I saw him immediately stop and put his finger on
15 the middle picture on the bottom row.

16 **Q** Okay. How confident or how certain did he
17 appear to you to be regarding this decision?

18 **A** He appeared very confident. He put his
19 finger on there and stated something in Spanish as
20 soon as he got that photo.

21 **Q** Okay. And by indicating that photo, was he
22 indicating to you that this was the person who had
23 robbed him?

24 **A** That's correct.

25 **Q** Did you make that clear with him?

1 **A** I did.

2 **Q** Okay. You asked him about that?

3 **A** I asked him through his brother. Actually he
4 stated to me. Uh, I asked him if that's the guy. He
5 said yes. I said, well, how do you know this guy. He
6 said that's the guy that robbed me, that's the one
7 that took my wallet.

8 **Q** All right. Let me show you State's Exhibit
9 number 1 that's already in evidence. Is this the
10 photographic lineup that you used with Mr. Perez?

11 **A** It is.

12 **Q** It has your signature on the form?

13 **A** Yes, sir.

14 **Q** It has the date and time?

15 **A** Yes, sir.

16 **Q** The circle around the middle photograph on
17 the bottom, that was made by?

18 **A** By Mr. Perez.

19 **Q** By Mr. Perez. Okay. That's his signature?

20 **A** That's correct.

21 **Q** The picture that he circled, is that the
22 picture of this defendant in this case, Bobby Barton?

23 **A** That's correct.

24 **Q** All right. Please answer any questions the
25 Defendant would have.

1 there is normally a criminal description sheet filed.

2 Are you aware of that?

3 **A** Completed by uniform patrol, yes.

4 **Q** All right. And, uh, did you receive this
5 one, the one in this case?

6 **A** No.

7 **Q** So you weren't matching that description?

8 **A** No.

9 **Q** Can you tell the jury what that description
10 is?

11 **MR. MOYER:** I object.

12 **THE COURT:** I will sustain that.

13 **MS. ROSS:** All right. Nothing further on
14 that.

15 **BY MS. ROSS:**

16 **Q** Did you notice when you set up this photo
17 lineup that that picture was a little bit lighter than
18 the other pictures?

19 **A** I did not.

20 **Q** That wasn't something that you had planned?

21 **A** Absolutely not. I can't control the, uh, --
22 I don't know if you would say the tint or the colors
23 of the copier machine.

24 **Q** But it was the same photograph, the mug shot
25 from the arrest of Mr. Barton in early August,

1 correct?

2 **A** That's correct. That's the most recent
3 photograph.

4 **Q** And are you familiar with "mug shot"
5 magazine?

6 **A** I am.

7 **Q** Is that the same exact photograph that
8 appears on page 3 of "mug shot" magazine?

9 **A** Again, it's poor quality, but it appears to
10 be the same photo, yes.

11 **Q** All right. And on page 8 of this magazine is
12 the co-Defendant, Patricia Rice, is that correct?

13 **A** That's correct.

14 **Q** Are there any other Armed Robbery charges
15 from Greenville in that?

16 **MR. MOYER:** Your Honor, I have to object to
17 something that's not into evidence. I object to
18 him being referred to a document that he has no
19 firsthand knowledge of. That's not in evidence.

20 **THE COURT:** Overruled. He can look at it
21 and answer the questions.

22 **THE WITNESS:** As long as it hasn't changed,
23 there's not.

24 **BY MS. ROSS:**

25 **Q** All right. So there's two charges of Armed

1 Robbery crimes and that is Patricia Rice and Bobby
2 Barton?

3 **A** Correct. Male and female.

4 **Q** Thank you. Are you aware that the date, uh,
5 this lineup that was given five months later was
6 scheduled for a hearing in Mr. Barton's case?

7 **A** At the time, no.

8 **MR. MOYER:** I object to relevance.

9 **THE COURT:** Well, maybe she can make it
10 relevant. I don't know.

11 **BY MS. ROSS:**

12 **Q** Do you know of a phenomenon called
13 transference about eyewitness identification?

14 **A** I learned a little bit about it earlier.

15 **Q** Isn't it possible that if someone sees a
16 photograph at one point in time and sees the same
17 photograph later, it could trigger a false
18 identification?

19 **MR. MOYER:** I object. No foundation.

20 **THE COURT:** I sustain that. That's asking
21 for an expert opinion. He wasn't qualified as an
22 expert.

23 **MS. ROSS:** All right. I've got no further
24 questions.

25 **MR. MOYER:** Nothing further, Your Honor.

1 would that refresh your memory?

2 **A** Yes.

3 **Q** Is that a copy of your report?

4 **A** Yes, sir. [REDACTED] [REDACTED].

5 **Q** Okay. Is that in Greenville County?

6 **A** Yes, sir.

7 **Q** Can you -- would you step down and take a
8 look at the aerial map we have, right?

9 **A** Yes.

10 **Q** Can you show the jury -- let me move it
11 actually closer to the jury. Could you point out to
12 the jury the area you responded?

13 **A** This is [REDACTED], [REDACTED] right here. I
14 believe Mr. Perez's trailer was one of these three
15 right here, I believe. It was right in that area
16 right there.

17 **Q** Okay. You can have a seat for me. Uh, what
18 was the date?

19 **A** (No response.)

20 **Q** Once again, would it help you ---

21 **A** Yes.

22 **Q** --- to take a look at your report?

23 **A** Yes. July 25th, 2009.

24 **Q** What time was it that you, uh, responded to
25 that location?

1 **A** Shortly after midnight.

2 **Q** Now, you met with Mr. Perez, the victim in
3 the case?

4 **A** Yes, sir. Yes, sir.

5 **Q** Do you speak Spanish at all?

6 **A** No, sir.

7 **Q** Any of the other officers who were out there
8 with you all speak Spanish?

9 **A** No, sir. Not anyone that was working with us
10 at the time.

11 **Q** Okay. So how did you communicate with Mr.
12 Perez?

13 **A** We found out that his brother who was inside
14 the trailer spoke English. So we had him come
15 outside. He was a big help for us.

16 **Q** All right. So you were communicating through
17 him. What was the description you got of the person
18 who had robbed him?

19 **A** It was a black male between 5'8 and six-foot
20 wearing all black. The age limits were between 20 to
21 30 years old, black male.

22 **Q** You said -- was it 20 or 25?

23 **A** 25 to 30, I'm sorry.

24 **Q** This is all accomplished, not by talking to
25 the victim himself, but talking to the, uh, his

1 Honor, Richard Rice, Johnny Brown and Mike Jarvis.

2 THE COURT: Okay. How long are they going
3 to take?

4 MR. MOYER: I think I'll be finished by
5 5:00.

6 THE COURT: Okay. Somebody might mess it up
7 with her concise cross-examination.

8 Mr. Barton, you satisfied with Ms. Ross now?
9 She's doing a real good job.

10 Okay. Let's get them.

11 A really good job. Pardon my grammatical
12 error.

13 (WHEREUPON, the jury enters at approximately
14 4:24 p.m.)

15 THE COURT: All right, Mr. Moyer.

16 MR. MOYER: Thank you, Your Honor. The
17 State would call Patricia Rice.

18 PATRICIA RICE

19 having first been sworn, testifies as follows:

20 DIRECT EXAMINATION

21 BY MR. MOYER:

22 Q Okay. Ms. Rice, would you please state your
23 full name?

24 A My name is Patricia Rosalyn Rice.

25 Q And how old are you?

1 **A** I'm 53.

2 **Q** Okay. Now, you got arrested for armed
3 robbery in this case, didn't you?

4 **A** Yes, sir.

5 **Q** And your charge was dismissed?

6 **A** Yes, sir. They were.

7 **Q** You know that it's over with?

8 **A** Yes, sir.

9 **Q** You know that what you say today in court --
10 what you say in court and whether or not you cooperate
11 will not change things?

12 **A** Yes, sir. I do.

13 **Q** You understand that?. I also ask you about
14 this, a few years ago, in 2008, you got a criminal
15 conviction for lying to the police about your name,
16 didn't you?

17 **A** Yes, sir.

18 **Q** You got picked up by the police and you gave
19 a false name instead of your real name, isn't that
20 right?

21 **A** Yes, sir.

22 **Q** Okay. Now, let me take you to the night of
23 July the 25th of 2009. Were you present that night
24 when the robbery took place in the trailer park?

25 **A** Yes, I was.

1 Q And who did this robbery?

2 A Bobby Joe Barton.

3 Q And Bobby Joe Barton here in this courtroom?

4 A Yes, he is.

5 Q Is he the man seated in the blue shirt over
6 there?

7 A Yes, he is. Yes, he is.

8 Q Okay. Now, how long have you known Mr.
9 Barton?

10 A Around 10 years.

11 Q You met about 10 years ago?

12 A 2001, yes.

13 Q Were y'all just friends or was it ever more
14 than that?

15 A He was my boyfriend.

16 Q Okay. Did y'all ever live together?

17 A Yes, we did.

18 Q Just one time or did you live together more
19 than one time?

20 A We lived together a couple of times.

21 Q Been kind of boyfriend and girlfriend on and
22 off over the past 10 years?

23 A That's correct.

24 Q So even after you stopped living with him,
25 you been romantically involved with him after that

1 time?

2 A Yes, sir.

3 Q Okay. Now, the night this incident happened,
4 where did you first see Bobby Joe Barton?

5 A He was walking along (inaudible).

6 Q Come a little bit closer to the microphone.

7 A We met up with each other.

8 Q Where did you meet up with him?

9 A I was coming from the store.

10 Q You were coming from the store?

11 A Yes.

12 Q The store on White Horse Road?

13 A Yes.

14 Q Where were you going?

15 A Just walking.

16 Q Just walking and you came across Mr. Barton?

17 A That's right.

18 Q Did y'all walk together?

19 A Yes.

20 Q Did you go through the trailer park?

21 A Yes, we did.

22 Q And why were you going through the trailer
23 park?

24 A It's a shortcut.

25 Q It's a shortcut to where?

1 **A** A shortcut to go across the tracks to get on
2 the other side.

3 **Q** Across the railroad tracks?

4 **A** Yes.

5 **Q** Were you going to the neighborhood on Lanford
6 Drive and Papermill?

7 **A** That's correct.

8 **Q** That's where you were headed?

9 **A** Yes, sir.

10 **Q** Is that a common shortcut?

11 **A** Yes, it is.

12 **Q** Did you used to stay over in that area?

13 **A** I did.

14 **Q** A good bit?

15 **A** I lived there at one time.

16 **Q** You lived there at time?

17 **A** Uh-huh.

18 **Q** Did the Defendant live over there or stay
19 over there some times?

20 **A** Not on that particular side.

21 **Q** He would go over there sometimes too?

22 **A** A lot of people hang out there.

23 **Q** A lot of people hang out there. Mr. Barton
24 would hang out there some too?

25 **A** Sometimes.

1 Q Now, when you came across, uh, Mr. Barton,
2 y'all started walking together through the trailer
3 park?

4 A Yes, sir.

5 Q And did Bobby Barton, before he did the
6 robbery, did he say anything about he was going to do
7 any kind of robbery?

8 A No, he did not.

9 Q So y'all walked up to, uh, -- you recognize--

10 MS. ROSS: Judge, I object to the leading.

11 THE COURT: Try not to lead so much.

12 THE WITNESS: I just remember his face.

13 BY MR. MOYER:

14 Q Okay. Uh, y'all walked up to -- did y'all
15 walk up to a trailer that night?

16 A We was walking through there.

17 Q Okay. And you saw somebody near the trailer?

18 A Yes.

19 Q What did you see Bobby Barton do?

20 A I didn't see him do nothing in particular.
21 It was dark. It just happened.

22 Q What did you see happen?

23 A I didn't really see nothing. I just seen him
24 take off running. And I heard that man -- I guess it
25 was him. I heard him make a noise.

1 Q You heard what man make a noise?

2 A I guess it would be that -- Mr. Perez is his
3 name?

4 Q Okay.

5 A I guess it would be him.

6 Q You heard him make a noise?

7 A Just like somebody screaming a little bit.

8 Q Did y'all walk up to that man first? Did
9 y'all walk over to where he was?

10 A Yes.

11 Q Was he by himself when y'all saw him?

12 A I would like to say he was.

13 Q Okay. And he was drinking beer?

14 A I wasn't. He was drinking beer.

15 Q Yeah, this man.

16 A That's correct.

17 Q He was drinking beer?

18 A Uh-huh.

19 Q And you and Bobby Barton walked up there.
20 Did y'all stop when he got up to where he was?

21 A Close to where he was. I was kind of off a
22 little bit. I was waiting on him.

23 Q Okay. And you saw Bobby Barton go over to
24 near where the Defendant was?

25 A That's correct.

1 Q And when he got over near where Mr. Perez
2 was, what did you see Bobby Barton do?

3 A They was just talking. I didn't really just
4 see him do anything. Like I said, it happened so
5 fast.

6 Q Okay. Well, you remember talking to a police
7 officer after the incident took place. You got
8 arrested, didn't you?

9 A Exactly.

10 Q About a week later?

11 A Exactly.

12 Q And you talked to the police officer and, uh,
13 -- you talked to the police officer about what
14 happened that night, didn't you?

15 A Yes.

16 Q Did the police officer ask you who did the
17 robbery?

18 A Yes, he did.

19 Q Did the police officer ask if you were there?

20 A Yes, he did.

21 Q And did you tell the police officer you were
22 there?

23 A Sure did.

24 Q Did you tell the police officer who did the
25 robbery?

1 **A** I did.

2 **Q** Who did you tell the police officer did the
3 robbery?

4 **A** Bobby Joe Barton.

5 **Q** What did you tell the police officer, Bobby
6 Joe Barton did to the victim?

7 **A** I couldn't say exactly what he did to the
8 victim. I couldn't see. He had his back turned.

9 **Q** Okay. Now, who had his back turned?

10 **A** Bobby had his back turned. I couldn't see no
11 one's face. It happened so fast.

12 **Q** Okay. Well, so he had his back turned
13 between you and the victim?

14 **A** Yes.

15 **Q** And so was he close to the victim?

16 **A** Yes.

17 **Q** Was he right up on the victim?

18 **A** Yes.

19 **Q** And what did you hear the victim say?

20 **A** He just let out a scream or a sound.

21 **Q** Like a scream. And what did you hear Bobby
22 -- what did you hear Bobby Barton say?

23 **A** Just turn it a loose.

24 **Q** He said turn it loose?

25 **A** Something to that effect.

1 Q Something to that effect, but turn it loose?

2 A Yes.

3 Q And after he said that, what did you see
4 Bobby Joe Barton do?

5 A I didn't see him do nothing. He just took
6 off.

7 Q Did he stay there?

8 A He took off running.

9 Q He took off running. And you told that to
10 the officer that night or when you got arrested,
11 right?

12 A I did.

13 Q And you remember you also told the officer
14 that he jacked him up against the trailer, didn't you?
15 Didn't you tell him that?

16 A If I said that, I said something to that
17 effect. I couldn't exactly see what he was doing, but
18 it was something being done.

19 Q Something being done. And he had him over
20 there right by the trailer?

21 A Yes.

22 Q And by saying jacked him up against the
23 trailer, is that an accurate description of what he
24 did to him?

25 A To the best of my memory.

1 Q Okay. So because Bobby Barton's back was
2 towards you, you couldn't see his hands, could you?

3 A I couldn't.

4 Q And it was dark out there?

5 A It was.

6 Q Could you tell whether or not he had anything
7 in his hand, any kind of weapon?

8 A I couldn't tell.

9 Q You couldn't see his hands?

10 A I couldn't see it.

11 Q Okay. And what did you do after Bobby Joe
12 Barton ran off?

13 A I turned around and then I stopped. I
14 thought what am I running for. I declined my running.
15 I didn't do anything.

16 Q So you started running and stopped?

17 A At the end. I panicked. I did, because it
18 scared me.

19 Q So you knew something bad had just happened?

20 A Of course.

21 Q So you stopped and you then -- you didn't
22 stay around for the police though, did you?

23 A No, I didn't. I just walked on home.

24 Q Now, you got arrested for this about a week
25 later, right?

1 A I did.

2 Q August 3rd of 2009?

3 A Yes.

4 Q And you know it was this detective right here
5 that arrested you?

6 A Yes.

7 Q And did this investigator start questioning
8 you right away about the robbery?

9 A He did.

10 Q Did you tell him right away that Bobby Joe
11 Barton was the one who did it?

12 A I did.

13 Q You told him that because it's true?

14 A Because it's true.

15 Q Okay. Please answer any questions that the
16 defense may have.

17 **CROSS-EXAMINATION**

18 **BY MS. ROSS:**

19 Q Okay. This happened in July, not in August,
20 right?

21 A That's correct.

22 Q And you didn't go to the police then in July,
23 did you?

24 A No, I did not.

25 Q And you didn't give any statement or anything

1 to the police until you were actually arrested ---

2 **A** Exactly.

3 **Q** --- and charged with Armed Robbery?

4 **A** Exactly.

5 **Q** So it was when you were arrested and being
6 charged with Armed Robbery that you gave a statement
7 implicating Bobby Joe Barton?

8 **A** That's right.

9 **Q** Now, you stayed in jail on that charge for
10 how long?

11 **A** 11 months.

12 **Q** All right. And so after 11 months, you were,
13 uh, released?

14 **A** Finally.

15 **Q** And this was right before Bobby Joe was
16 scheduled for trial, the weekend before you were
17 released?

18 **A** Right.

19 **Q** And, uh, isn't it true that you told Bobby's
20 brother that, uh, that you were testifying because
21 they could bring the charges back against you?

22 **A** No, that's not why I said that. I felt like
23 it was very unfair to be put in that position and for
24 me to spend almost a whole year in jail for something
25 I did not do.

1 were sitting and talking?

2 **A** Uh-huh.

3 **Q** And drinking beers together?

4 **A** Uh-huh.

5 **Q** And you said that though you couldn't see
6 much, what you saw was Bobby's back jacking Mr. Perez
7 up on the trailer?

8 **A** Something to that effect.

9 **Q** Did you see a knife?

10 **A** No, I didn't see a knife.

11 **Q** Did you see a wallet?

12 **A** I saw something look like a wallet. I'm not
13 sure. I can't remember.

14 **Q** Would it surprise you in your statement you
15 said you didn't see a knife or a wallet?

16 **A** Well, the reason I said this about the
17 wallet, because on my warrant, it has what happened to
18 the man, why I was charged with Armed Robbery, a
19 wallet of \$500 or something like that. That's the
20 reason I knew that.

21 **Q** In your statement though, you didn't know
22 nothing about a wallet, right?

23 **A** I don't remember. I could listen to
24 something and tell you the man said or what it is on
25 my warrant.

1 **THE WITNESS:** I can not.

2 **THE COURT:** Okay.

3 **BY MS. ROSS:**

4 **Q** Uh, did you have any independent recollection
5 of a large amount of cash being found on Mr. Barton?

6 **A** No, ma'am.

7 **Q** And, uh, Mr. Barton did not attempt to evade
8 you once you caught his attention and put him under
9 arrest?

10 **A** Correct.

11 **MS. ROSS:** All right. I've got nothing
12 further.

13 **MR. MOYER:** Nothing further.

14 **THE COURT:** Okay. Thank you. You can step
15 down.

16 **MR. MOYER:** The State would call
17 Investigator Mike Jarvis.

18 **THE COURT:** Okay.

19 **MIKE JARVIS**

20 having first been sworn, testifies as follows:

21 **DIRECT EXAMINATION**

22 **BY MR. MOYER:**

23 **Q** Okay. Investigator Jarvis, uh, state your
24 full name.

25 **A** Michael Steven Jarvis.

1 Q And where are you employed?

2 A Greenville County Sheriff's Office.

3 Q And how long have you been in law
4 enforcement?

5 A 15 years.

6 Q Has it all been with the sheriff's office?

7 A Yes.

8 Q What is your position with the sheriff's
9 office?

10 A Currently, investigator with the Family
11 Violence Unit.

12 Q And what was your position in August of 2000
13 -- July and August of 2001?

14 A At that time, I was an investigator with the
15 Armed Robbery Unit.

16 Q And you were assigned this case?

17 A Yes.

18 Q Let me ask you, did you meet with Mr. Perez
19 in an attempt to make an identification in this case?

20 A I did.

21 Q What was the date of that?

22 A I met with him on August the 3rd of 2009.

23 Q Did you take it as described earlier?

24 A Yes.

25 Q What was the purpose of that?

1 **A** He had given me an additional description to
2 what I read in the original report that was taken by
3 Deputy Lanford of the female. He made mention that he
4 had seen her in the past. He believe that she hung
5 out in the area behind where he lived at across the
6 railroad tracks. I asked him if he minded if we -- if
7 he saw her again, would he recognize her. He said
8 that he could recognize her.

9 **Q** And you were able to speak to Mr. Perez. You
10 speak Spanish?

11 **A** Yes.

12 **Q** And now so did he go in your vehicle?

13 **A** Yes. I put him in my car. We drove around.
14 We went, uh, down White Horse to South Fairfield. I
15 had to kind of go around a loop, uh, because where he
16 was saying that she normally hung out at, I couldn't
17 just drive straight there. So I had to drive around
18 and went down South Fairfield and turned left onto, I
19 believe, it's Papermill Road. As we were driving down
20 Papermill Road, to our left, there was a group of four
21 people. There was three black males and a black
22 female. He -- as we were passing by, he immediately
23 pointed out the black female standing there to the
24 left and said that was the female.

25 **Q** Okay. Will you show us on the map where it

1 was that you saw him?

2 **A** Sure.

3 **Q** Saw her.

4 **A** The victim was here. I couldn't drive over
5 here. This was the area that he said she hung out at.
6 I had to go back out to white -- went back out here
7 and went to White Horse Road and came down South
8 Fairfield. As soon as you cross the railroad tracks,
9 Papermill Road. As we were coming down Papermill
10 Road, right down -- I want to say right around in here
11 where these trees are is where that group of four
12 people was standing. One of them was Patricia Rice.

13 **Q** Okay. Thank you. When you saw her, what --
14 when he pointed her out, what did y'all do?

15 **A** I was in an unmarked car, a Blazer with
16 tinted windows. So I had a uniform patrol come to the
17 area. Before they could get there, she got into a
18 vehicle. I followed the vehicle until a uniform
19 patrol could stop the vehicle and we could make
20 contact with Ms. Rice.

21 **Q** All right. And so was Ms. Rice taken out of
22 the car that she had been in?

23 **A** Yes.

24 **Q** And so it was Ms. Rice, the woman who
25 testified just a few minutes ago?

1 **A** That's correct. She was the passenger in the
2 vehicle.

3 **Q** Did you speak to her at that time?

4 **A** I did.

5 **Q** You talked to her about that robbery with Mr.
6 Perez?

7 **A** Yes.

8 **Q** Did she tell you who the man was that robbed
9 Mr. Perez?

10 **A** Yeah. She said it was Bobby Joe Barton.

11 **Q** Prior to that time, did you have a name, this
12 name or any idea of the identity of who the male was
13 that did the robbery prior to speaking with Ms. Rice?

14 **A** No, sir. Not prior to speaking with her.

15 **Q** Was this conversation out with her on the
16 street before you took her to the Law Enforcement
17 Center?

18 **A** Yes, before I took her to the Law Enforcement
19 Center, she had already told me that Bobby Joe Barton
20 was the person who had committed the robbery.

21 **Q** Now, were you present the following day,
22 August the 4th, when the Defendant was arrested?

23 **A** I was in the area. I was helping the other
24 deputies attempt to locate Mr. Barton. I was not
25 present when Deputy Brown located the Defendant. I

1 heard him call over the radio that he had located him
2 and he had him in custody. I drove over and met him
3 over at his vehicle.

4 Q Okay. Uh, you saw the Defendant that day?

5 A Yes.

6 Q Now, does he look any different now than he
7 did then?

8 A His hair was a little shorter and not as much
9 gray hair. It looks like he was a little bit heavier.
10 I remember him being a little bit stockier that day
11 than he looks now.

12 Q Now, did you talk to Deputy Brown or did you
13 take anything from Deputy Brown?

14 A Yeah, uh, later that day, Deputy Brown
15 advised me or once we got back to the office because
16 he and his partner drove the Defendant back to the Law
17 Enforcement Center. Once they got back to the office,
18 he advised me that during the search, he had located a
19 pocket knife on Mr. Barton. I told him that the
20 victim had said that he had been robbed with the
21 knife. So I took possession of that knife from Deputy
22 Brown.

23 Q And would you take a look at State's Exhibit
24 number 3? Can you tell us what that is?

25 A That's the, uh, pocket knife that Deputy

1 Brown gave me that day.

2 **Q** Okay. Is that in substantially the same
3 condition now as it was when you received it back on
4 August 4th of 2009?

5 **A** Yes.

6 **MR. MOYER:** Your Honor, at this time, we ask
7 State's Exhibit number 3 be entered into
8 evidence.

9 **MS. ROSS:** No objection.

10 **THE COURT:** All right. Without objection.

11 (WHEREUPON, State's Exhibit 3 is marked and
12 admitted into the record.)

13 **BY MR. MOYER:**

14 **Q** Okay. Would you show that to the jury?

15 **A** Sure. It's a regular pocket knife. It opens
16 up like that. It's got a serrated edge.

17 **Q** Thank you. You can close it again. Please
18 answer any questions the defense may have.

19 **CROSS-EXAMINATION**

20 **BY MS. ROSS:**

21 **Q** Investigator Jarvis, you are the lead
22 investigator on this case?

23 **A** Correct.

24 **Q** Correct? And you are familiar with pretty
25 much all aspects of the case?

1 understanding?

2 **A** No, I was out sick that day.

3 **Q** Now, as far as this picture, this doesn't
4 look like a black male 25 to 30 years old, does it?

5 **A** The picture of who?

6 **Q** Any of the pictures in this photo lineup, for
7 that matter.

8 **A** No.

9 **Q** There's gray hair?

10 **A** Correct.

11 **Q** In this case, there was no DNA or anything
12 involved in this case or any physical evidence
13 involved in this case, is there?

14 **A** No, ma'am.

15 **Q** And are you familiar with any DNA exoneration
16 where people with DNA were proven not guilty?

17 **A** No.

18 **Q** You never heard of that happening?

19 **A** Oh, I've heard of it happening, yes.

20 **Q** Are you aware that that often happen -- the
21 convictions happen due to eyewitness identification?

22 **MR. MOYER:** Objection, Your Honor.

23 Relevance and this is outside the scope of his
24 personal knowledge.

25 **THE COURT:** Yeah. How is this relevant?

1 **MR. MOYER:** There's no evidence in this
2 case --

3 **MS. ROSS:** Judge, it's relevant in that this
4 is purely an eyewitness case.

5 **MR. MOYER:** There has been no evidence in
6 this case that there's anything that could be --

7 **THE COURT:** Yeah. I would sustain the
8 objection.

9 **MS. ROSS:** All right. I've got no further
10 questions.

11 **THE COURT:** All right. Any followup?

12 **MR. MOYER:** One quick followup.

13 **REDIRECT EXAMINATION**

14 **BY MR. MOYER:**

15 **Q** Did you give -- when you spoke to Mr. Perez,
16 you told him about Ms. Rice being arrested. Did you
17 ever give him Bobby Barton's name as a suspect?

18 **A** No, sir.

19 **Q** You never gave him that?

20 **A** No, sir.

21 **Q** Okay. Thank you.

22 **THE COURT:** Okay. Step down.

23 **THE WITNESS:** Thanks, Your Honor.

24 **MR. MOYER:** Your Honor, at this time, the
25 State would rest.

1 **THE COURT:** Okay. You understand you have a
2 perfect right to testify?

3 **MR. BARTON:** Yes, sir. Uh, --

4 **THE COURT:** I'm sorry. Go ahead.

5 **MR. BARTON:** It doesn't matter. It doesn't
6 matter.

7 **THE COURT:** Okay. You sure? Just tell me
8 what you want to tell me. You have any questions
9 about your right to testify? Is there any
10 hesitancy in your mind about your decision?

11 **MR. BARTON:** No, sir.

12 **THE COURT:** Okay.

13 **MR. BARTON:** No, sir.

14 **MS. ROSS:** Okay. And I'm just talking to my
15 client. If you will note, we did not request a
16 charge for Strong Arm Robbery.

17 **THE COURT:** All right. You don't want one?

18 **MS. ROSS:** That's his request.

19 **THE COURT:** Okay.

20 **MR. MOYER:** Your Honor, I would request it.

21 **THE COURT:** Well, what -- is there evidence
22 in the record that he --

23 **MR. MOYER:** There's evidence in the record
24 that he stole, uh, that he robbed the victim,
25 used force or intimidation to rob. The victim

1 gave testimony that he felt what he believed to
2 be a knife against his throat but he didn't see
3 the knife. The witness did not see the knife. I
4 think the jury could get hung up on the fact that
5 perhaps, although there's evidence there could
6 have been a deadly weapon involved, the jury
7 could have doubt. I think, under the facts of
8 the case, of this case, that Strong Arm Robbery
9 should be charged.

10 **MS. ROSS:** Judge, just in response, in light
11 of that position with the State, I renew my
12 motion to dismiss the Possession of a Weapon
13 during a Violent Crime charge that is alleged
14 here.

15 **THE COURT:** He's not conceding that he
16 didn't have a knife. He's just conceding that
17 you have raised that issue to such a level that
18 he's concerned the jury might find that there
19 wasn't a weapon. You do want identification
20 charged? You asking for identification?

21 **MS. ROSS:** Yes, and Request number 7 goes
22 specifically to that.

23 **THE COURT:** Right. Do you want a charge on
24 his failure to testify?

25 **MS. ROSS:** Yes.

1 **THE COURT:** Yes, sir.

2 **MR. MOYER:** Good morning, Ladies and
3 Gentlemen. As the judge just told you, we are
4 now, uh, finished with the testimony phase of the
5 trial and we are moving on to the argument phase
6 of the trial. I will not be long, but this is
7 not a long trial. There's no reason to spend an
8 enormous amount of time going over what you heard
9 just a couple of hours yesterday anyway.

10 What this means though is that the testimony
11 phase of the case is closed and there can not be
12 anymore evidence or testimony presented. I
13 sometimes see jurors in cases wanting to get more
14 information after they start deliberation,
15 deliberating on a case. That can not take place.
16 Sometimes the jurors, they want witness
17 statements or police reports. Things like that
18 can not happen. Except in very rare situations,
19 the Rules of Evidence do not allow for
20 introduction of things like statements and police
21 reports and so forth. So the testimony you heard
22 yesterday is what you will use to decide this
23 case in just a few moments.

24 Now, as you decide the case, I think the
25 first question you have to ask yourself is was

1 there an armed robbery. Secondly, you are going
2 to move on to is this defendant, Bobby Barton,
3 the one who committed that armed robbery. Very
4 quickly, I think we can dispense of the first
5 question, was there an armed robbery in this
6 case.

7 The judge is going to tell you and explain to
8 you the law on Armed Robbery in just a few
9 minutes. He's going to tell you that essentially
10 an armed robbery is taking goods or monies,
11 properties, from another person through force or
12 intimidation while armed with a gun, a knife,
13 brass knuckles, I believe, is in the statute or
14 any other, uh, any other instrument that can be
15 used as a deadly weapon. That would be an armed
16 robbery.

17 So in this case, you've heard testimony from
18 Edwin Perez that a knife was pressed to his
19 throat when he was robbed. I would argue to you
20 that I think that would be something that would
21 be unmistakable. If you feel a blade pressed
22 against your throat, you would know what that
23 was. Edwin Perez didn't see the knife, but he
24 acted as if there was a knife against his throat
25 and allowed himself to be robbed and his wallet

1 with \$500 was taken from his pocket. We also
2 know that a knife was found in the possession of
3 this defendant just about a week later when he
4 was arrested.

5 I think it is unmistakable that even though
6 Edwin Perez can't tell you he saw the knife and
7 even though Patricia Rice who testified said she
8 didn't see the knife because his back was to her,
9 a knife was used. Edwin Perez could feel it and
10 he said in the very beginning that a knife was
11 used.

12 Ladies and Gentlemen, if, when you are
13 deliberating this case, you decide that in your
14 opinion there was not sufficient evidence to
15 believe that there was a knife used, then you
16 have a lesser included offense to consider and
17 that would be Strong Arm Robbery. Strong Arm
18 Robbery or just common-law robbery and it's even
19 called Highway Robbery, all terms for the same
20 crime, means there was an armed robbery but there
21 wasn't a weapon used. It would be taking goods
22 or money from another person by force or
23 intimidation. So I would argue to you that you
24 will find, when you begin your deliberations,
25 that there was an armed robbery in this case.

1 The second question you have to decide is is
2 this defendant, Bobby Barton, the one who
3 committed this crime. More specifically, you
4 have to ask yourself is did the testimony we
5 heard yesterday, does that prove beyond a
6 reasonable doubt that this defendant is the one
7 who committed the crime. As you've heard already
8 and His Honor is going to instruct you, the
9 burden of proof in criminal cases is beyond a
10 reasonable doubt. I ask you at this point,
11 Ladies and Gentlemen, to not make more of that
12 than it is. The law is not beyond any doubt.
13 The law does not put that burden on the State,
14 otherwise, I don't think anyone could ever be
15 convicted.

16 The law is not, as I heard somebody misquote
17 it once, beyond a shadow of a doubt. It's beyond
18 a reasonable doubt. That's the same burden of
19 proof that is used in all criminal cases, no
20 matter how seemingly insignificant. For example,
21 a traffic ticket. If you went to magistrate's
22 court and asked for a jury trial for a speeding
23 ticket, you couldn't be held responsible for that
24 unless you were guilty, unless the evidence
25 showed beyond a reasonable doubt. The same way

1 all the way up to the most serious crimes that we
2 have, a capital murder case.

3 Let's talk about how the evidence shows
4 beyond any reasonable doubt that this defendant
5 is the person who robbed Edwin Perez. The type
6 of evidence you've heard in this case comes in
7 the form of testimony, eyewitness testimony. You
8 heard from an eyewitness, Patricia Rice. You
9 heard from the victim, Edwin Perez, that this
10 defendant is the one who robbed him.

11 Quite truthfully, if there had been any other
12 witnesses, I doubt the trial ever would have
13 happened. People don't commit crimes like this
14 when there are other witnesses. It was certainly
15 understandable that there wasn't other people
16 around. This was late at night. It's midnight
17 in this small little trailer park. This happened
18 very quickly. You heard Patricia Rice said this
19 was over so quickly. This is the kind of crime
20 that even if other people had heard something
21 going on, it would have happened too quickly for
22 anyone to come around and see it happening while
23 it was taking place.

24 What we also know about this, this took place
25 in a mobile home in July. What do we know about

1 a mobile home in July is that there's going to be
2 a lot of window air conditioners going on. So
3 even if there had been any noise taking place out
4 there in the mobile home park, it's unreasonable
5 to think that anyone would have heard.

6 This isn't the kind of case like a burglary
7 or a rape that's going to leave behind evidence
8 like fingerprints or DNA. This is also not the
9 kind of case that one would have what you would
10 call Hollywood evidence. No one can go out to
11 the crime scene and waive a wand around and
12 gather DNA or evidence. This is the kind of
13 case, like so many others, that is solved by
14 talking to eyewitnesses.

15 So let's talk about the two eyewitnesses in
16 this case. First, Patricia Rice. Patricia Rice
17 told you, Ladies and Gentlemen, from the witness
18 stand that this is the person who committed this
19 crime. In order for you to discount her
20 testimony, you would have to believe that she
21 lied, that she lied to the officer on the scene
22 when this initially happened, that she then lied
23 when she was interviewed by the officer later on
24 and that she took the stand and lied.

25 Before accepting that, someone who lied so

1 blatantly like that, let's think about
2 motivations. What motivation would Patricia Rice
3 have to lie that you heard about in this case? I
4 want you to think for a minute, how much would
5 you have to absolutely pay another person in
6 order to frame that person for a serious crime?
7 How you would have to loath and hate and despise
8 a person to do that, knowing the ramifications.

9 This isn't a situation analogous to the
10 criminal conviction you have heard talk about
11 with her where she gave false information to
12 police once about her own name when she was
13 trying to avoid getting picked up herself. This
14 is a situation of framing another person for a
15 very, very serious crime.

16 On the contrary, all the evidence that you
17 heard yesterday was actually to the contrary of
18 that. The evidence was that she was actually
19 quite fond of this defendant. Let's think about
20 what we've heard. First of all, she is walking
21 with him close to midnight in a dark trailer park
22 in the area that you have heard actually has a
23 lot of crime in it. She trusts and likes him
24 well enough to do that.

25 We also know that she knew him for some ten

1 years. They had an on-again/off-again romantic
2 relationship. You even heard that one time he
3 committed an assault, a domestic violence against
4 her that she cared enough for him that later on,
5 when it came time for court, she said, "No, I
6 think you've been punished enough. I want to
7 give you a second chance." She liked him enough
8 for that as well. In all indications, her
9 relationship with him was one of, at the very
10 minimum, fondness, but at the very most, perhaps
11 love. Not the kind of person that you would lie
12 about.

13 Consider also how this identification came
14 about. Remember, when she was first stopped by
15 Investigator Jarvis, she had no notion that this
16 was coming. This was not the kind of situation
17 where she received a telephone call from police
18 and said, "Hey, would you come down here and talk
19 to us about this crime. We think you might have
20 some information. You might have been a
21 witness." Giving her time to think up a story.
22 Giving her time to mull it over.

23 No, she was stopped. Investigator Jarvis got
24 out and talked to her. And immediately, before
25 Investigator Jarvis found that drug paraphernalia

1 on her, before he even told her she was going to
2 be charged, she said Bobby Barton was the one who
3 did it. Then when she was caught with the
4 paraphernalia and then when she was, uh, actually
5 charged with this crime, she continued saying
6 Bobby Barton was the one who did this.

7 Think about it in this light. At this stage
8 of the game, she wants to curry favor with the
9 police, right? She wants the police on her side
10 because she's been charged with a serious crime.
11 Why would you risk telling the police the wrong
12 person committed this crime not knowing whether
13 that person could be exonerated later through
14 other means or found out you're lying? When you
15 are going to tell the police about an instance
16 like that, when you want the police to be on your
17 side, you are going to tell them the truth.

18 Then you also heard that she -- you heard her
19 testify in court yesterday with no charges
20 hanging over her head, no reason to lie. She
21 knows the charges can not be brought back against
22 her. She said that very clearly. She has
23 nothing to gain or lose. She continued to say
24 that this defendant, Bobby Barton, with whom she
25 had lived, was the person who committed the

1 crime.

2 Let's move on now, finally, to the second
3 witness. Edwin Perez. Edwin Perez was the
4 victim of this case. He also said that this
5 defendant was the robber. Well, we know he
6 wasn't lying, right? He has no reason to lie and
7 say Bobby Barton was the one who did it. Bobby
8 Barton didn't do it. He didn't really know Bobby
9 Barton. He had seen him maybe once or twice in
10 the neighborhood, but he doesn't have anything
11 against him. He has no reason to lie. So in
12 order to discount his statement or his testimony,
13 you would have to believe that he was mistaken.
14 You would have to believe that he is mistaken.

15 So let's talk about that. First off, he's
16 testified in court that he is sure that this
17 person seated in the courtroom, Bobby Barton, is
18 the one who robbed him. He said he understood
19 the significance of what he was saying. He
20 understands how important it is.

21 We also know, and you heard a little bit
22 about this photograph in the magazine, this "mug
23 shot" magazine. We know that after the Defendant
24 was arrested, that a mug shot was taken of him
25 obviously and it was published in this magazine

1 that you've heard about that has hundreds of
2 photographs of different people who had been
3 charged with crime. Edwin Perez found a copy of
4 it. I think he said it was lying on the ground
5 where he was working or whatever, but he started
6 leafing through it and he sees the Defendant's
7 photograph.

8 Keep in mind, at this point, he was very
9 clear to say he did not know the name of the man
10 who had been robbed. He did not know Bobby
11 Barton's name. Investigator Jarvis testified
12 that he did not tell Edwin Perez the name of
13 Bobby Barton. So when Edwin Perez was looking
14 through that magazine, keep in mind also he
15 doesn't read English. Even if he knew the name,
16 he couldn't read. He wouldn't be able to read
17 the name. He wouldn't be able to read the
18 charges. He was very clear that he did not --
19 his brother who speaks English did not look at
20 that magazine until after he was looking through
21 it and saw the man who robbed him and he showed
22 his brother.

23 As you know from this photo lineup that was
24 introduced, police lineups have six pictures in
25 them. That's a standard police photographic

1 lineup as you've heard Investigator King testify
2 to yesterday. Six photographs. This "mug shot"
3 magazine has hundreds and he saw this defendant
4 in it and he picked him out.

5 Now, you heard some questions on cross-
6 examination yesterday from the defense leaving
7 one perhaps to believe that Edwin -- that you
8 should hold it against Edwin Perez that when he
9 saw the "mug shot" magazine for not calling the
10 police and telling them "I saw him". Just take
11 one moment to think about how unreasonable that
12 expectation would be for any victim. Any victim
13 who has been a victim of, say, a bank robbery or
14 something or on the news that night sees the
15 person on the news. There's no reason to think
16 that there's any obligation on your part to call
17 the police and say, oh, by the way, you know, I
18 saw him. The person is arrested.

19 Then, when you consider someone as
20 unsophisticated as Edwin Perez is, he sees the
21 magazine, he knows the person is arrested,
22 probably a feeling of relief. All right, the
23 police got him. And he moves on.

24 What about this initial description to
25 police? Mr. Perez testified in court yesterday

1 that the robber to him looked 30 or 40 years old.
2 The uniform officer who was out at the scene
3 wrote down that Mr. Perez told him that the
4 robber was 25 to 30 years old. We know the
5 Defendant was somewhat older than that. We don't
6 know an exact age. I don't think that ever came
7 out. We know he's somewhat older than that.

8 Now, I think under the circumstances, it's
9 completely reasonable. Again, remember how Edwin
10 talked about how dark it was out there that
11 night. It was only a little light on the trailer
12 from which he could see what was going on. He
13 had just been the victim of an armed robbery. He
14 just had a knife pressed against his throat.

15 Imagine those circumstances. Panic, fear,
16 the trauma you are under while you are trying to
17 talk to police. Once again, he is not speaking
18 to the officer himself. There's an intermediary
19 that he's trying to get all this information to.
20 The idea that somehow you would get down in the
21 police report that he's 25 to 30 years old is
22 completely understandable. It's also
23 understandable that we can't all judge people's
24 ages that well. We don't know how old people can
25 be. That's a very tricky thing to try to do.

1 But what can make us confident of this
2 identification is this point, no matter how much
3 he had to drink that night, no matter what he
4 told the officer, he was right about Patricia
5 Rice. If you remember, Investigator Jarvis took
6 Edwin Perez out in his car a week later. They
7 drove through that neighborhood that was across
8 the railroad tracks. Edwin Perez said, "That's
9 the woman. That's the woman who was there." And
10 it was. He was right. He got her right. There
11 is no reason to think that he didn't get the
12 Defendant right.

13 In conclusion, I want you to think about
14 this. Mr. Perez has more incentive than anybody
15 to pick the right person. Do you think if it
16 really was the wrong person in that "mug shot"
17 magazine or in his photographic lineup, if the
18 person in his mind really was some young 25 to
19 30-year-old guy, it's hard to imagine would be
20 hanging out with Patricia Rice, who, by the way,
21 is 50 years old.

22 Don't you think if anyone would stand up and
23 say, no, police, you got it wrong, it's really a
24 much younger guy, it's not him, Edwin Perez has
25 that incentive? If you've been robbed, you want

1 the real robber to be caught. You don't want
2 somebody you are not sure about. You're not
3 going to be flippant about that. You want the
4 real robber, the real person who put the knife
5 against your throat, you want that person caught.
6 You don't want the real robber out there running
7 around doing who knows what in a neighborhood
8 right next to yours. He, I would argue to you,
9 has more incentive than anyone.

10 Ladies and Gentlemen, lightning doesn't
11 strike twice. There are two completely separate
12 identifications of this defendant by two
13 completely and separate independent people who
14 had no contact with one another. Edwin Perez,
15 independently, chose this defendant. Patricia
16 Rice, independently said this defendant is the
17 one. The odds of that happening are not
18 realistic.

19 In addition to that, and I will just go over
20 this real quickly, but there's other
21 corroborating evidence. We know the Defendant
22 was arrested in that area where Patricia Rice
23 was, where Patricia Rice was arrested. We know
24 the Defendant was trying to evade the police when
25 the police were there on August the 4th of 2009.

1 The police officer saw him trying to go across
2 that very cut, that very shortcut into the
3 crossroad towards White Horse Road. We also know
4 he had a knife in his pocket.

5 Ladies and Gentlemen, I asked you at the
6 beginning of this case, I told you at the
7 beginning of the case that, at the end, I would
8 ask you to do justice in this case. Ladies and
9 Gentlemen, I firmly, sincerely argue to you at
10 this time that justice means holding this
11 defendant responsible for robbing Edwin Perez. I
12 ask you to find him guilty. Thank you.

13 **MS. ROSS:** Thank you, Your Honor.

14 Ladies and Gentlemen, you probably seen me
15 conferring with my client quite a bit during this
16 trial. He's charged with serious crimes. He's
17 pled not guilty. He's told you all he knows, and
18 that was that wasn't me. I wasn't there. Then
19 it's up to me to talk to these witnesses and get
20 out the evidence that shows that he wasn't there
21 for you to hear. That's why he's been conferring
22 with me. This is so serious to him.

23 I, too, would ask you to do justice. Justice
24 is requiring the state to prove guilt beyond a
25 reasonable doubt. The reason for that is, in

1 many cases, at midnight, if you are home alone,
2 you don't have an alibi. You can't put up a
3 defense.

4 Making the State prove guilt beyond a
5 reasonable doubt forces the State not to put
6 innocent people in jail. It makes you, the jury,
7 a group of citizens who have no reason to reward
8 anyone, no biases, hands it to you to make a
9 determination of whether that person is really
10 guilty or not. That determination, you took an
11 oath, can only be found when the State has proven
12 that guilt beyond a reasonable doubt.

13 Now, let's talk about this case. This was a
14 case where, as the State said to you, lightning
15 doesn't strike twice. How could this happen?
16 How could Bobby Barton be sitting there if he
17 wasn't guilty. That's essentially what the State
18 is saying. The reason he's there is because
19 Patricia Rice fingered him.

20 Ladies and Gentlemen, she did have a iron in
21 this case. She hated Bobby Barton. She brought
22 charges against him before, only to later lift
23 them. She's lied to police before to get herself
24 out of trouble. Patricia Rice has bias and
25 motive. The State got up and argued she wouldn't

1 lie. She said something about Bobby Barton
2 before she was arrested.

3 Ladies and Gentlemen, think about this
4 incident. Uh, Mr. Perez is driven in a police
5 car next to where Priscilla [sic] Rice is
6 standing with three men. Close enough so that he
7 can see her and ID her and points her out. That
8 was the testimony that you heard from her and the
9 officer, that she was ID'd in person by Mr.
10 Perez. Then a marked car comes up and pulls her
11 over. Of course, she knows what this is all
12 about. And she's got a crack pipe in her
13 pocketbook. She's got a crack problem, a drug
14 problem. She lives on the streets. She throws
15 out the name Bobby Barton. And I will submit to
16 you she throws him out because she knows there's
17 no retribution from him when she lies on him,
18 because she's done it before.

19 She lied about the CDV. He didn't come back
20 and punish her for having him arrested for
21 Criminal Domestic Violence. Now, if she lied on
22 a real person, a real drug dealer or someone in
23 the area, they might come back and punish her.
24 There might be some retribution if she lied on
25 the 25 to 30-year-old who probably did this. So

1 I would just point out she has a reason to
2 dislike Bobby Barton. She knows he lives in the
3 area. She said she knows he's in the area. She
4 knew he would be around. She knew that he
5 wouldn't get her after she lied on him. He was
6 an easy person, a scapegoat, an easy person to
7 point the finger at.

8 And Priscilla, excuse me, Pamela [sic] Rice
9 was experiencing this system. She had been on
10 the streets long enough to know how to deal with
11 the cops. What you do, if there's evidence
12 against you, you throw it on somebody else. And
13 it worked for her. Her crack pipe, she's not
14 charged with that. She gets out of her armed
15 robbery charge.

16 Now, the State has minimized her involvement,
17 just going along with the fact that she wasn't
18 involved. Ladies and Gentlemen, I submit to you
19 that if she's there and \$500 is stolen, she's
20 going to be buying crack with that \$500 and with
21 whoever stole it. She got part of what was
22 taken, if something was taken, if, in fact, Mr.
23 Perez just happened to be outside of his house
24 with \$500 in his pocket.

25 I don't want to miss anything. That's why

1 I'm looking at my notes. I'd point out too about
2 why would she come in here and testify. Why was
3 she just seeking justice? Ladies and Gentlemen,
4 right after the incident, she wasn't there. She
5 didn't come back from the incident and say, oh,
6 it happened like this, police officers.
7 Remember, they had lots of officers, dogs running
8 around the whole area? Pamela [sic] didn't come
9 back and say, oh, guys, I want justice to happen
10 so I got to tell you what happened. It was only
11 a week later when she is fingered and then picked
12 up and then arrested and then charged with armed
13 robbery herself that she does come back in here
14 and testify before you.

15 I point out, she was released from prison
16 about a month ago after being in for 11 months.
17 There was enough evidence for the State to keep
18 her in there for 11 months and only dismiss the
19 charges, I submit to you, in exchange for her
20 testimony against Bobby Barton.

21 She doesn't like it. She's the jilted woman.
22 She's the scorned woman. That's another reason
23 she came in. Kick the charges off of her and she
24 doesn't like Bobby. That's why she threw out his
25 name in the first place. She's not a credible

1 witness because she's got bias against Bobby
2 Barton and a motive to lie.

3 Now, let's talk about Mr. Perez. The missing
4 witness in all this, this is an eyewitness case,
5 but the missing witness, where was Mr. Perez's
6 brother? You heard that he was the translator.
7 He was the one on the 9-1-1 call. He was the one
8 on the phone. He's the one who translated 25 to
9 30 years. The State made a lot of he doesn't
10 understand Spanish, there was no one to
11 translate. The victim's brother spoke English.
12 He was the one translating. He was not here.

13 I submit to you he wasn't here because the
14 State has the burden of proof. They are bringing
15 their case. They are not going to bring in
16 someone who doesn't help their case. I will
17 submit that the brother knew that the victim, Mr.
18 Perez, did say 25 to 30 years old. That's what
19 the brother told the police on the scene. That's
20 why he wasn't here to testify.

21 He also wasn't here because he didn't hear a
22 scream. Now, I just ask you, you heard these
23 trailers are about this far from each other. The
24 State said something about air conditioning
25 units. I submit to you that possibly someone

1 would have a window open or someone would hear
2 screaming in a very close-quartered trailer room
3 area. Someone would hear some screaming. Now,
4 maybe they wouldn't be an eyewitness, but someone
5 would have come out and talk to police and say
6 I've heard that scream too or I saw somebody
7 running by my trailer or something.

8 There's nothing. No thrown down wallet. No
9 pawned wallet. No Mexican ID picked up. No
10 \$500. I submit to you that those things don't
11 exist and haven't been presented to you and the
12 State has not proven guilt beyond a reasonable
13 doubt or there would be something.

14 Now, that goes back to Mr. Barton. He's pled
15 not guilty. He's told you he's not guilty. The
16 State has to prove that beyond a reasonable
17 doubt. The reason there's nothing else here is
18 because, in fact, he's not guilty. He didn't
19 have that stuff. He didn't do this crime.
20 That's why there's nothing else there.

21 Now, let's talk more about this. When you
22 hear this -- in opening, I felt bad. When you
23 hear, you know, the victim picked him out of a
24 lineup, that sounds very bad until you hear about
25 the "mug shot" magazine. The "mug shot"

1 magazine, and, if you will remember, Investigator
2 King went through that magazine in front of you,
3 looked through and, under the Greenville arrests,
4 there were two arrests for armed robbery during
5 that time period. One was Pamela [sic] Rice.
6 And there was her picture with Armed Robbery, the
7 words, underneath. The other -- that was on page
8 8. The other was Bobby Barton who was on page 3
9 with this exact same photograph. He had been
10 arrested about 5 days before that magazine came
11 out. That exact same photograph was in "mug
12 shot" magazine.

13 You heard Mr. Perez's testimony that he saw
14 that picture in that magazine. That same
15 picture. Then he sees it again. He thinks that
16 must have been the guy. He thinks that must have
17 been the guy I've seen around my neighborhood all
18 the time. That's the one the police picked out.
19 That must be the guy.

20 Now, remember, you heard Investigator Jarvis
21 and Mr. Perez say that Mr. Perez was notified
22 about the arrest. This was a violent crime,
23 Armed Robbery. There's a Victims Rights Act. If
24 you are a victim, the police tell you when they
25 arrested the person who supposedly robbed you. I

1 submit to you the police give their name as well.
2 They just don't say someone, but we're not going
3 to give them the name.. Mr. Perez knew the name
4 Bobby Barton. He also had the ability or could
5 have looked it up online if he had known. He was
6 somehow sophisticated enough to get the "mug
7 shot" magazine and go through it. That goes,
8 again, with the missing brother.

9 Ladies and Gentlemen, he was looking through
10 that magazine with his brother. This is Pamela
11 [sic] Rice. This is the woman that I picked out.
12 He and his brother were going over it. He's
13 like, here's the other armed robbery. Here's a
14 guy in the area. That must be the guy.

15 Now, eyewitness testimony is a very difficult
16 area. It's something that people get wrong a
17 lot. A lot of times, people mess up eyewitness
18 testimony. It's terrible because the brain isn't
19 like -- you think it's like a camera, it's not.
20 When someone is highly intoxicated to the point
21 where the police officer doesn't even take a
22 statement from him, you've got to have a question
23 there.

24 Now, even being so intoxicated, he says 25 to
25 30 years old. Now, that was not a mistake in

1 translation, the brother could have told you that
2 if the state had brought the brother in. That
3 was simply what Mr. Perez said at the time, 25 to
4 30 years old.

5 Now, this man here is not 25 to 30 years old.
6 Now, what happened with Mr. Perez is he finds out
7 Bobby Barton's arrested and then the memory
8 starts to go in place like someone who is highly
9 intoxicated and someone else says, "You won't
10 believe what you did last night. It was this."
11 Then the memory starts to come together after the
12 fact.

13 Now, there are a lot of things to support
14 that. Think back about Mr. Perez's testimony.
15 I'd like you to just think back to yesterday what
16 was said. If you will recall, he clearly had met
17 with the State a number of times and reviewed his
18 testimony. There were a lot of mistakes. He'd
19 answer the wrong thing and then it would be
20 corrected. He clearly reviewed that testimony.
21 Part of that reviewing testimony is whenever
22 someone comes on the witness stand and says this
23 is the guy who did it, you are supposed to be
24 confident. Otherwise, the State won't get a
25 conviction. You can't come in and be like, well,

1 I was really drunk and I'm not sure because the
2 State's not going to get a conviction.

3 So when you review a witness, that witness is
4 always going to say "I'm confident". So Ladies
5 and Gentlemen, I would just ask you to take that
6 for what it's worth knowing how inebriated he
7 was. Also knowing that he testified that he had
8 seen Bobby Barton around the neighborhood. He
9 had seen his attacker. At the time, he didn't
10 say that. Someone who knows the person who
11 attacked them would say that. Mr. Perez did say
12 that about Pamela [sic] Rice.

13 A week later, Mr. Perez is sober. He meets
14 with Investigator Jarvis. I think it's nine days
15 later, actually. At that point, he says, you
16 know, upon reflection, Pamela [sic] Rice, tall,
17 Skinny, 50-year-old was the one who was there.
18 Then he goes and picks her out because he's seen
19 him around, seen her around the neighborhood. At
20 that point, he does not change his description of
21 the attacker, the male. The description is still
22 25 to 30-year-old black male. He has no more
23 detail at that point. He doesn't say, "By the
24 way, I've seen him around." He doesn't say that.

25 Then, once he looks at "mug shot" magazine, a

1 couple of weeks after the incident, he never
2 calls him to say, "Hey, you got the right guy.
3 That is the guy." He never says that. What
4 happens is months later, during a hearing, they
5 finally show him a lineup. At this point, he's
6 had "mug shot" magazine for months, been looking
7 at it. He sees a familiar picture, the same
8 picture. The only other armed robbery charge
9 during that time.

10 Now, let's talk about the knife. This knife
11 is in evidence. I question the relevance of this
12 knife. No knife was identified. Mr. Perez never
13 saw a knife. He said he felt a knife on his
14 neck. Notice the reporting officer didn't see
15 any marks on his neck. I would ask you to take a
16 look at the knife. It's like a pocket knife.
17 Part of the blade is straight and part of the
18 blade is serrated. I'd just ask you to think to
19 yourself if it's hard enough to feel on your
20 neck, wouldn't there be something? Wouldn't
21 there be some bruise from being pushed down?

22 He said the wallet was in his back pocket.
23 Turned over, pulled wallet out of back pocket.
24 That's certainly not what Ms. Rice testified
25 happened. She said he was jacked up. So

1 completely different testimony about the details.
2 And the reason for that is because Bobby Barton
3 didn't do it and it didn't happen like that
4 because Mr. Perez has no real recollection of
5 what happened. He was very, very intoxicated.
6 Ms. Rice has a reason to get Bobby Barton. She's
7 just coming up with something. She's reading the
8 cops. What do you want? What do you want? And
9 she's giving them what they want to get herself
10 off.

11 Remember, it was a 9-1-1 hangup. Mr. Perez
12 would have you believe that he called 9-1-1.
13 They only speak Spanish, oops, and hangs up.
14 Ladies and Gentlemen, 9-1-1 has the capabilities
15 to handle Spanish speaking callers.

16 **MR. MOYER:** Your Honor, I'd object.

17 **THE COURT:** That's not in evidence.

18 **MS. ROSS:** Uh, calls 9-1-1 and then hangs
19 up. 9-1-1 calls back. Then they talk to his
20 brother. Nothing is given to suggest anything
21 but 25 to 30-year-old attacking him. Now, as far
22 as Investigator King, just going through some
23 testimony, he did the lineup on January 8th, much
24 later after the incident. He did look at this
25 "mug shot" magazine and go through it right in

1 front of you and see that there were only two
2 people with armed robbery charges. One being Ms.
3 Rice, who Perez knew was involved because he had
4 picked her out later, after the fact. Later
5 after the fact, she was involved. At that point,
6 he didn't change any of the story implicating
7 Bobby Barton. He was still saying 25 to 30-year-
8 old even then.

9 I point out Jackie Lanford told you that he
10 thought Breakers or Pumpers, the place down the
11 street. He was leaving and he came straight over
12 and saw Bobby on the way and all that, he said
13 the Pumpers probably closed around 11:00. This
14 happened a little after 12:00. Again, he's at
15 the scene. They took this seriously. They
16 called out the dogs, did investigation and came
17 up with nothing. No one else, no one heard the
18 scream. No one saw anything. No wallet thrown
19 down. No nothing.

20 Now, the State does have the burden of proof.
21 Like I said in the beginning, the reason for that
22 is to prevent innocent people from being
23 convicted of a crime. They did not show you what
24 they didn't want you to hear. Only what they
25 wanted you to -- that really -- there is stuff

1 out there. If this happened, there would be some
2 neighbors. You would be hearing from the brother
3 who would come in and say, oh, the police just
4 botched the description and botched everything.
5 The brother would be in here saying that if
6 that's what happened. But it's not. There was
7 no idea of a knife. If someone's robbed like
8 that on their back down, how did he get the
9 wallet so fast? How did he know the wallet was
10 there?

11 With what we have here -- I wasn't there. I
12 don't know -- but it's just as likely that this
13 was a case where the victim had lost his money or
14 engaged in drug activity or done something and
15 then had to explain it to his family. If he was
16 doing something like that, it wouldn't be
17 surprising that Pamela [sic] Rice would be the
18 person he was doing it with. She lived in the
19 area, knew where drugs were.

20 The fact that this thing about the 25 to 30-
21 year-old description, the initial description is
22 huge. There is no way this guy, Bobby Barton
23 could be mistaken for a 25 or 30-year-old. There
24 is just no way. And later, after the fact, when
25 there was time to clear up and say, oh, yeah, I

1 was wrong. I seen this guy in the area, Mr.
2 Perez never cleared that up. But when he
3 testified, he said he had seen him around in the
4 past and that he did know who he was. If he had
5 and Bobby Barton was the one who did this, he
6 would have said something at the time.

7 I'm just trying to make sure I didn't miss
8 anything. No ID found. Yes, Bobby Barton was
9 found with a knife. Perfectly legal knife to be
10 carrying. Not a knife that matched an initial
11 description. No blood on the knife. No scars or
12 marks on Mr. Perez. No ID pawned. Nothing
13 consistent or supporting this initial story.
14 This was a memory that was created later, after
15 the fact. It was implanted because that victim
16 saw a picture in "mug shot" magazine. He sees
17 Bobby Barton around. He sees that picture and
18 says, oh, that must be the guy. That is not a
19 memory of that was the guy that did this.

20 Now, I'm sure I forgot to say a lot of
21 things. I'd ask you -- I probably misstated some
22 things. So I would ask you to just make sure you
23 go by your recollection of what you heard those
24 witnesses say yesterday. Hold your oath. Hold
25 the standard of the State proving guilt beyond a

1 reasonable doubt. Ladies and Gentlemen, I find
2 that they didn't. I'd ask you to do the right
3 thing and find Bobby Barton not guilty. Thank
4 you.

5 **THE COURT:** All right. Ladies and Gentlemen
6 of the jury, during this trial, you and I have
7 certain duties to perform. As the trial judge,
8 it is my responsibility to preside over the trial
9 of the case and to rule on the admissibility of
10 the evidence that's offered during the trial. It
11 is also my duty to charge you the law applicable
12 to the case. It is your duty as jurors to accept
13 and apply the law as I now state it to you.

14 As I said in my opening comments, if you
15 think you have any idea as to what the law is or
16 what the law ought to be and it does not agree
17 with what I tell you the law is now, you must
18 forget your own ideas because you have sworn an
19 oath to accept and apply the law precisely as I
20 state it.

21 I would also remind you that in every case
22 tried in this court before a jury, you, the jury,
23 are the sole and exclusive judges of the facts.
24 A trial judge can not comment on or make any
25 statement about the facts in the case. So please

1 don't think anything I may have said or doing
2 throughout the course of the trial that I have an
3 opinion about the facts. I do not.

4 I would also instruct you that the fact that
5 the Defendant was arrested, charged and indicted
6 in this case is not evidence of guilt. Nor does
7 it create any presumption or inference of guilt.
8 These documents are simply the formal written
9 instruments which contain the charges made
10 against the Defendant. They serve as the
11 documents by which this case is processed and
12 brought into court.

13 The indictment in this case alleges two
14 separate offenses against the Defendant. The
15 charges are Armed Robbery and Possession of a
16 Weapon during the Commission of a Violent Crime.
17 Each count of the indictment charges a separate
18 and distinct offense. You must decide each count
19 separately from the evidence and the law
20 applicable to it, uninfluenced by your decision
21 as to any other count in the indictment.

22 The Defendant may be convicted or acquitted
23 of any or all of the offenses charged. That's
24 not quite accurate. I will explain that to you
25 with respect to Possession of a Weapon at the

1 time I charge you on that. You will be asked to
2 write a separate verdict of guilty or not guilty
3 of each count of the indictment.

4 Necessarily, you must determine the
5 credibility or believability of the witnesses who
6 have testified in the case. It becomes your duty
7 as jurors to evaluate the evidence and determine
8 which evidence convinces you that it is true. In
9 determining the believability of the witnesses,
10 you may believe one witness over several or
11 several over one. You may believe a part of the
12 testimony of a witness and reject the remaining
13 part. You may believe the testimony of a witness
14 in its entirety or reject that testimony in its
15 entirety. You may consider whether the witness
16 has an interest in the result of the trial,
17 whether the witness is prejudiced towards either
18 the State or the Defendant, the opportunity for
19 the witness to have seen the matters and things
20 about which the witness has testified and the way
21 the witness acts on the witness stand.

22 I would instruct you and I emphasize that the
23 fact that the Defendant did not testify is not a
24 factor to be considered by you in any way in your
25 deliberations on the question of the guilt or

1 innocence of the Defendant. It must not be
2 considered by you in any manner whatsoever.

3 Every citizen has the constitutional right to
4 remain silent. The assertion of this right must
5 not be considered by you in your deliberations.
6 The burden of proof is always on the State and a
7 defendant never is required to prove their
8 innocence.

9 Now, the Defendant has pled not guilty to the
10 indictment. That plea puts the burden on the
11 State to prove the Defendant guilty. A person
12 charged with committing a criminal offense in
13 South Carolina is never required to prove
14 themselves innocent. I charge you that it is a
15 cardinal and an important rule of the law that a
16 defendant in a criminal trial will always be
17 presumed innocent of the crime for which an
18 indictment has issued, unless guilt has been
19 proven by evidence satisfying you of guilt beyond
20 a reasonable doubt.

21 Now, reasonable doubt is the kind of doubt
22 which would cause a reasonable person to hesitate
23 to act. A reasonable doubt may arise from the
24 evidence which is in the case or from the lack or
25 absence of evidence in the case. You, the jury,

1 must determine whether or not reasonable doubt
2 exists as to the guilt of this defendant. The
3 state has the burden of proving each and every
4 element of a crime beyond a reasonable doubt.
5 Any reasonable doubt that you may have in your
6 deliberations should be resolved in favor of the
7 Defendant.

8 A sign -- an issue in this case is the
9 identification of the Defendant as the person who
10 committed the crime charged. The State has the
11 burden of proving identity beyond a reasonable
12 doubt. You must be satisfied beyond a reasonable
13 doubt the accuracy of the Defendant -- excuse me
14 -- the accuracy of the identification of the
15 Defendant before you may convict him.

16 Identification testimony is an expression or
17 belief or impression by -- expression of belief
18 or impression by a witness. You must determine
19 the accuracy of the identification of the
20 Defendant. You must consider the believability
21 of each identification witness in the same way as
22 any other witness.

23 You may consider whether the witness had an
24 adequate opportunity to observe the offender at
25 the time of the offense. This will be affected

1 by things like how long or short a time was
2 available to view, how far or close the witness
3 was, the lighting conditions and whether the
4 witness had the chance to see or know the person
5 in the past. Once again, I instruct you that the
6 burden of proof on the State extends to every
7 element of the crime charged and this
8 specifically includes the burden of proving
9 beyond a reasonable doubt the identity of the
10 Defendant as the person who committed this
11 offense or these offenses.

12 Now, armed robbery. The Defendant is charged
13 with Armed Robbery. In order to prove this
14 offense, the State must first prove beyond a
15 reasonable doubt that the Defendant took personal
16 property from the person or presence of another
17 person. Property is in the presence of a person
18 if it is within the person's reach, inspection,
19 observation or control so that the person could,
20 if not overcome with violence or prevented by
21 fear, keep possession of the property.

22 The State must also prove beyond a reasonable
23 doubt that the Defendant carried the property
24 away intending to permanently deprive the owner
25 of the property and to keep the property for the

1 Defendant's own use. The slightest removal of
2 the property or the complete possession of the
3 property, even for an instant, by the Defendant,
4 is sufficient to show a taking and carrying away
5 of the property. The taking and carrying away of
6 the property must have been done with violence or
7 by putting the owner of the property in fear of
8 violence.

9 Finally, the State must prove beyond a
10 reasonable doubt that the Defendant was armed
11 with a deadly weapon during the robbery or
12 alleged, either by action or words, that he was
13 armed while using a representation of a deadly
14 weapon or any object which a person present
15 during the commission of the robbery reasonably
16 believed to be a deadly weapon.

17 A deadly weapon is any article, instrument or
18 substance which is likely to cause death or great
19 bodily harm. Whether an instrument has been used
20 as a deadly weapon depends on the facts and the
21 circumstances of each case. The following are
22 examples of instruments which may be deadly
23 weapons: a pistol, a shotgun, a rifle, a dirk, a
24 dagger, a knife, a slingshot, metal knuckles, a
25 razor, gasoline, a fire bomb or molotov cocktail

1 and lighter fluid. A gun may be a deadly weapon
2 even if it is not operating.

3 Now, if you find that the State has failed to
4 prove the Defendant was armed with a deadly
5 weapon, you may then consider whether the State
6 has proved beyond a reasonable doubt that the
7 Defendant committed robbery. Now, in order to
8 prove robbery, the State must prove beyond a
9 reasonable doubt that the Defendant took the
10 personal property from the person or presence of
11 another person without that person's consent and
12 carried it away. Property is in the presence of
13 a person if it is within the person's reach,
14 inspection, observation or control so that the
15 person could, if not overcome with violence or
16 prevented by fear, retain possession of the
17 property.

18 The State must show that the Defendant
19 carried the property away with the intent to
20 permanently deprive the owner of the property and
21 to convert the property to the Defendant's own
22 use. Again, I tell you that the slightest
23 removal of the property or the complete
24 possession of the property, even for an instant,
25 by the Defendant, is sufficient to show a taking

1 and carrying away of the property. The taking
2 and carrying away of the property must have been
3 done by violence or by putting the owner of the
4 property in fear of violence.

5 The second count of the indictment is
6 Possession of a Weapon during the Commission of
7 or Attempt to Commit a Violent Crime. Now, the
8 State must prove beyond a reasonable doubt that
9 the Defendant was in possession of a firearm or
10 visibly displayed what appeared to be a firearm
11 or visibly displayed a knife during the
12 commission of a violent crime. In order to find
13 the, uh, Defendant guilty of Possession of a
14 Weapon during the Commission of a Violent Crime,
15 you must first find the Defendant guilty of
16 either committing a violent crime or attempting
17 to commit a violent crime. Armed Robbery is
18 defined as a violent crime under our law.

19 So you must consider each count independently
20 based on its own, on its own evidence and law as
21 it applies to that count. And you must decide
22 first whether or not the State has met its burden
23 of proof beyond a reasonable doubt that the
24 Defendant is guilty of Armed Robbery. If you
25 find that the Defendant is guilty of Armed

1 Robbery, then you go to Count 2, Possession of a
2 Weapon during the Commission of a Violent Crime.
3 So in order to convict the Defendant of Count 2,
4 Possession of a Weapon, you must first convict
5 the Defendant of Count 1, which is Armed Robbery.
6 If you find that the State has failed to prove
7 beyond a reasonable doubt that the Defendant was
8 in possession of a weapon during the commission
9 of the crime and you find the Defendant guilty of
10 Robbery, Strong Arm Robbery or Common-law Robbery
11 or Robbery, they are all the same, then you may
12 not consider Count 2. Okay. You move to Count 2
13 only if you find that the State has proven beyond
14 a reasonable doubt that the Defendant is guilty
15 of Armed Robbery.

16 Now, Mr. Foreperson, Ladies and Gentlemen of
17 the jury, there are two possible -- I think I
18 have explained the verdicts for you. But there
19 are two possible verdicts that you can reach as
20 to these counts. They are guilty or not guilty.
21 There is no significance in the order in which I
22 state them to you. One's got to go first.

23 We have prepared a verdict form which we will
24 send back into the jury room with you for you to
25 record your verdicts. I think they are self-

1 explanatory. If you have questions with respect
2 to how it works, please let me know. Again, I
3 remind you, you must consider the Armed Robbery
4 first. If you find guilt beyond a reasonable
5 doubt as to Count 1, Armed Robbery, then you move
6 to Count 2. If you find not guilty on Armed
7 Robbery, you may then consider Strong Arm
8 Robbery. But if that's the case, you do not go
9 to Count 2. There has to be a conviction on
10 Count 1, Armed Robbery, in order to move to Count
11 2, Possession of a Weapon during a Violent
12 Offense.

13 Now, I will tell you, Ladies and Gentlemen,
14 uh, that your verdict must be unanimous. All 12
15 must agree on the verdict. It can not be based
16 on sympathy, passion, prejudice, emotion or any
17 other consideration which is not in evidence in
18 the case. Remember, you have no friends to
19 reward and you have no enemies to punish.

20 Now, Mr. Foreperson, when you all have
21 reached a unanimous verdict, please signal to the
22 bailiffs. We will receive you back into the
23 courtroom and take your verdict at that time.

24 Now, I'm going to excuse you all back to your
25 jury room, but I'm going to ask you not to begin

1 your deliberations just yet. I have to go over
2 my charge on the law with the attorneys to make
3 sure I have not misstated something or omitted
4 something. When you receive the verdict form
5 along with the evidence in the case, you may
6 begin your deliberations. Okay. I will excuse
7 you all to the jury room with the exception of
8 Ms. Stevens.

9 I have to ask you to stay in the courtroom,
10 Ms. Stevens.

11 **(WHEREUPON, the jury exits at approximately**
12 10:49 a.m.)

13 **THE COURT:** Ms. Stevens, you are just as
14 qualified and paid just as close attention as all
15 the other 12. I wish I could send you back in
16 there to deliberate. The law only allows 12. So
17 I, at this time, am releasing you from your
18 service on this case and happy to tell you that
19 you will not be called again today, but I need
20 you to call back after 6 p.m. to find out when
21 you next need to report or come back. Okay?
22 Thank you for your service.

23 **(WHEREUPON, the alternate juror exits at**
24 approximately 10:50 a.m.)

25 **THE COURT:** All right. Any exceptions or

1 objections to the charge?

2 MR. MOYER: Nothing from the State.

3 MS. ROSS: Judge, I just have the, again,
4 objection to the Strong Arm Robbery charge.

5 THE COURT: Okay.

6 MS. ROSS: I didn't hear my Request number 2
7 specifically. I believe you mentioned
8 opportunity to observe, did not go through, uh,
9 whether the witness was paying careful attention.
10 3, 4, 5, 6 points on my Request number 7. I
11 would object to that and ask that those be, uh,
12 presented to the jury on evaluating witness
13 credibility.

14 THE COURT: Mr. Moyer, you want me to -- I
15 think it's adequately covered in the charge.

16 MR. MOYER: I think so, Your Honor. Clearly
17 you covered everything. As far as her, what is
18 it, number 3? Or number 2? His cloak, removing
19 a cloak, that's from a 1975 case. That's --

20 THE COURT: I think it's adequately stated.
21 It's noted for the record. Okay. Do y'all want
22 to look at the verdict form and make sure you are
23 satisfied with it? Good?

24 MS. ROSS: No objection.

25 MR. MOYER: Good.

1 **THE COURT:** Go ahead and take it on back and
2 let them begin deliberating.

3 All right. We'll be at ease. First, let me
4 just say for the record, good job by both
5 attorneys.

6 Ms. Ross, excellent work. Thank you.

7 **(WHEREUPON,** a recess is taken at approximately
8 10:51 a.m.)

9 **(WHEREUPON,** jury deliberation begins at
10 approximately 10:52 a.m.)

11 **(WHEREUPON,** the Court resumes at approximately
12 12:00 p.m.)

13 **THE COURT:** It reads transcript of Mr.
14 Perez's testimony. I have replied a transcript
15 can not be provided but the testimony can
16 replayed in its entirety or any portion thereof
17 and signed it. If y'all would like to look at
18 it, we will send it back to the jury and get
19 their response.

20 **MS. ROSS:** That looks fine to me.

21 **THE COURT:** Okay. Take it on back.

22 **COURT REPORTER:** It's 46 minutes.

23 **THE COURT:** Four to six?

24 **COURT REPORTER:** 46.

25 **THE COURT:** If they want the whole thing,

1 it's 46 minutes.

2 Gaynelle, would you go tell them, verbally
3 tell them that this entire testimony is 46
4 minutes long.

5 **THE BAILIFF:** Okay.

6 **(WHEREUPON, Court's Exhibit 3 is marked for**
7 **identification purposes.)**

8 **(WHEREUPON, the bailiff exits the courtroom at**
9 **approximately 12:01 p.m.)**

10 **(WHEREUPON, the bailiff enters the courtroom at**
11 **approximately 12:02 p.m.)**

12 **THE BAILIFF:** They are going to talk about it
13 and let you know.

14 **THE COURT:** Okay.

15 **(WHEREUPON, a recess is taken, at approximately**
16 **12:05 p.m.)**

17 **(WHEREUPON, the Court resumes at approximately**
18 **12:54 p.m.)**

19 **THE COURT:** They, uh, want to be recharged --
20 Well, where is that note, Teresa? Could you
21 hand me that. Yeah.

22 Okay. They've sent out a question. Redefine
23 Armed versus Strong Arm Robbery. So I'm going to
24 bring them back and charge them. Okay.

25 Okay, Ms. Cooke.

1 **(WHEREUPON, Court's Exhibit 4 is marked for**
2 **identification purposes.)**

3 **(WHEREUPON, the jury enters at approximately**
4 **12:55 p.m.)**

5 **THE COURT:** All right. Mr. Foreman, Ladies
6 and Gentlemen of the jury, you have asked me to
7 redefine Armed versus Strong Arm Robbery. I'm
8 going to recharge you what I charged you before.
9 I'm going to tell you that Strong Arm Robbery is
10 a lesser included offense of Armed Robbery. The
11 elements are the same except that in Armed
12 Robbery, the State must prove beyond a reasonable
13 doubt that the Defendant was armed with a deadly
14 weapon which will be defined as I recharge this.

15 Armed robbery. In order to prove this
16 offense, the State must first prove beyond a
17 reasonable doubt that the Defendant took personal
18 property from the person or presence of another
19 person. Property is in the presence of a person
20 if it is within the person's reach, inspection,
21 observation or control so that the person could,
22 if not overcome with violence or prevented by
23 fear, keep possession of the property.

24 The State must also prove beyond a reasonable
25 doubt that the Defendant carried the property

1 away intending to permanently deprive the owner
2 of the property and to keep the property for the
3 Defendant's own use. The slightest removal of
4 the property or the complete possession of the
5 property, even for an instant, by the Defendant,
6 is sufficient to show a taking and carrying away
7 of the property. The taking and carrying away of
8 the property must have been done with violence or
9 by putting the owner of the property in fear of
10 violence.

11 Finally, the State must prove beyond a
12 reasonable doubt that the Defendant was armed
13 with a deadly weapon during the robbery or
14 alleged, either by action or words, he was armed
15 while using a representation of a deadly weapon
16 or any object which a person present during the
17 commission of the robbery reasonably believed to
18 be a deadly weapon.

19 A deadly weapon is any article, instrument or
20 substance which is likely to cause death or great
21 bodily harm. Whether an instrument has been used
22 as a deadly weapon depends on the facts and the
23 circumstances of each case. The following are
24 examples of instruments which may be deadly
25 weapons: a pistol, a shotgun, a rifle, a dirk, a

1 dagger, a knife, a slingshot, metal knuckles, a
2 razor, gasoline, a fire bomb or molotov cocktail
3 and lighter fluid. A gun may be a deadly weapon
4 even if it is not operating.

5 Now, if you find that the State has failed to
6 prove that the Defendant was armed with a deadly
7 weapon, you may then consider whether the State
8 has proved beyond a reasonable doubt that the
9 Defendant committed robbery, which is also known
10 as Strong Arm Robbery. In order to prove
11 robbery, the State must prove beyond a reasonable
12 doubt that the Defendant took the personal
13 property from the person or presence of another
14 person without that person's consent and carried
15 it away. Property is in the presence of a person
16 if it is within the person's reach, inspection,
17 observation or control so that the person could,
18 if not overcome with violence or prevented by
19 fear, retain possession of the property.

20 The State must show that the Defendant
21 carried the property away with the intent to
22 permanently deprive the owner of the property and
23 to convert the property to the Defendant's own
24 use. The slightest removal of the property or
25 the complete possession of the property, even for

1 an instant, by the Defendant, is sufficient to
2 show a taking and carrying away of the property.
3 The taking and carrying away of the property must
4 have been done with violence or by putting the
5 owner of the property in fear of violence.

6 Does that answer your questions? Okay.
7 Thank you. You may retire -- resume your
8 deliberations.

9 (WHEREUPON, the jury exits at approximately
10 1:00 p.m.)

11 THE COURT: All right. Any exception or
12 objection?

13 MR. MOYER: I do, Your Honor. When -- your
14 initial comment to the jury was that robbery is a
15 lesser included offense of Armed Robbery, the
16 only difference being that in Armed Robbery there
17 is possession of a deadly weapon. It would also
18 include the representation of a deadly weapon.

19 THE COURT: Well, I did say that, but I did
20 clear it up in my, in the actual charge itself.

21 MR. MOYER: Well, in the Armed Robbery
22 charge, but then before defining Robbery, Your
23 Honor said if failed to prove the Defendant was
24 armed with a deadly weapon, then you must
25 consider whether he is guilty of Common-law

1 Robbery. Once again, it should be, if the jury
2 fails to believe that the State proved beyond a
3 reasonable doubt that he was armed with a deadly
4 weapon or the representation of a deadly weapon.

5 I mean, I know your definition of Armed
6 Robbery included that terminology, but I think by
7 highlighting it in those two specific instances,
8 I think that's very -- I think it's important
9 from what the jury heard to, uh, -- I think
10 that's what they are focusing on, quite frankly.
11 And I think the jury needs to be clarified that
12 it's a weapon or the representation of a deadly
13 weapon.

14 **THE COURT:** Anything from the Defendant?

15 **MS. ROSS:** No, Your Honor.

16 **THE COURT:** Well, I think I covered it. I'm
17 going... all right. Bring them back in. I'll
18 just give them a brief recharge.

19 **MS. ROSS:** Judge, I would object to a
20 recharge. You charged them before on the
21 definition of Armed Robbery. This is only going
22 to highlight that.

23 **THE COURT:** Okay. We're off the record now.

24 (WHEREUPON, the Court went off the record at
25 approximately 1:02 p.m.)

1 (WHEREUPON, the jury enters at approximately
2 1:03 p.m.)

3 **THE COURT:** Ladies and Gentlemen, just out
4 of an abundance of caution, I want to make sure
5 that you understand that, uh, in order to prove
6 Armed Robbery, the State must -- one element is
7 the State must prove beyond a reasonable doubt
8 that the Defendant was armed with a deadly weapon
9 during the robbery or the Defendant alleged,
10 either by action or words he was armed while
11 using a representation of a deadly weapon or any
12 object which a person present during the
13 commission of a robbery reasonably believed to be
14 a deadly weapon. It's an element of Armed
15 Robbery.

16 If you find that the State has failed to
17 prove that the Defendant was armed with a deadly
18 weapon or with a representation of a deadly
19 weapon after having alleged that he was armed,
20 then you may consider whether or not, uh, he is
21 guilty of Strong Arm Robbery. So just remember
22 it's not, uh, just a deadly weapon, but it could
23 also be a representation of a deadly weapon once
24 the person has alleged that he was armed. Okay.
25 All right. Thank you very much.

1 (WHEREUPON, the jury exits at approximately
2 1:05 p.m.)

3 **THE COURT:** All right. Any exceptions or
4 objections?

5 **MS. ROSS:** Judge, I, again, would have
6 exception to that. It is highlighting that
7 aspect which is especially problematic in terms
8 of the fact that they had this witness up here
9 who supposedly understood no English. So having
10 made this allegation of "I'm armed with a deadly
11 weapon" would have almost been impossible in the
12 circumstance of this case.

13 **THE COURT:** Okay. All right. I just
14 charged them the law. All right. We'll be at
15 ease.

16 (WHEREUPON, jury deliberation resumes at
17 approximately 1:06 p.m.)

18 (WHEREUPON, a recess is taken at approximately
19 1:07 p.m.)

20 (WHEREUPON, jury deliberation concludes at
21 approximately 1:57 p.m.)

22 (WHEREUPON, the Court resumes at approximately
23 2:07 p.m.)

24 (WHEREUPON, the jury enters at approximately
25 2:08 p.m.)

1 **THE COURT:** Mr. Foreman, I understand y'all
2 have reached a verdict?

3 **THE JUROR:** We have.

4 **THE COURT:** All right. Would you hand it to
5 the bailiff please, sir.

6 (WHEREUPON, the verdict form is passed to the
7 Court.)

8 **THE COURT:** All right. If you would, please
9 publish that for us.

10 **THE CLERK:** The State versus Bobby Joe Barton,
11 as to the charge of Armed Robbery, we, the jury,
12 find the Defendant guilty. As to the charge of
13 Possession of a Weapon during the Commission of a
14 Violent Crime, we, the jury, find the Defendant
15 not guilty. This is your verdict so say you all?
16 (WHEREUPON, each juror responds.)

17 **THE COURT:** All right. Anything further of
18 the jury?

19 **MR. MOYER:** No, Your Honor.

20 **THE COURT:** From the defense?

21 **MS. ROSS:** No, Your Honor. I just renew my
22 prior.

23 **THE COURT:** Okay. Mr. Foreman --

24 **MS. ROSS:** At this point, I would like to
25 poll the jury.

1 **THE COURT:** Okay. I won't consider it. All
2 right. And how many days credit does he get in
3 jail?

4 **MR. MOYER:** I'm afraid I didn't add it up,
5 Judge.

6 **MS. ROSS:** He was arrested August 4th of
7 '09. So 371, I think.

8 **THE COURT:** That sounds right.

9 **MR. MOYER:** He was arrest August -- he's
10 been in jail since August the 4th of 2009. Today
11 is August the 10th.

12 **THE COURT:** All right. Now, Mr. Barton,
13 what do you want to tell me?

14 **MR. BARTON:** I would like to ask you are all
15 the motions that I put in, you said they are on
16 record, the motions that I filed prior to trial.
17 You said they all good? I just want to know.

18 **THE COURT:** They're all good?

19 **MR. BARTON:** I mean, what I'm saying are all
20 actually showing.

21 **THE COURT:** If you filed them, ---

22 **MR. BARTON:** Yes.

23 **THE COURT:** --- then they are in the file.

24 **MR. BARTON:** Okay.

25 **THE COURT:** We don't have hybrid

1 representation.

2 **MR. BARTON:** That wasn't what I was saying.
3 I just wanted to know were the motions good, on
4 file. Also I would like to know is as far as
5 witness credibility, anything dealing in effect
6 of honesty, would petty larceny also fall in that
7 category also? Is petty larceny, I just want to
8 know would that be considered to deal with
9 honesty. It's a just a question to the judge,
10 sir.

11 **THE COURT:** Well, I don't give advice.

12 **MR. BARTON:** Okay. Okay. Yes, sir. Yes,
13 sir. Yes, sir.

14 **THE COURT:** Okay. Ms. Ross, have anything?

15 **MS. ROSS:** Thank you, Your Honor. Since Mr.
16 Barton was in prison on this offense, he's
17 maintained his innocence and his desire to go to
18 trial. There were certainly arguments about bias
19 of the witnesses. I think those arguments were
20 made. I would point out that this charge, while
21 being serious, certainly, there was no cut or
22 injury here. I'd just beg the Court's leniency
23 on this, given the circumstances of this
24 particular case.

25 I would point out that Mr. Barton is 52 now.

1 He's got his GED. He's a lifelong resident of
2 Greenville. He has attended mental health, has
3 been diagnosed as Paranoid. He has attempted
4 suicide in the past. Given his age, any sentence
5 is going to be quite substantial ---

6 **THE COURT:** Yeah.

7 **MS. ROSS:** --- for him.

8 **THE COURT:** Yep. Well, the way I count it,
9 this would be his 31st conviction.

10 Mr. Moyer, anything you want to tell me?

11 **MR. MOYER:** Nothing else, sir.

12 **THE COURT:** What you want to tell me, Mr.
13 Barton?

14 **MR. BARTON:** I mean, uh, only thing I can
15 tell you is that I'm not guilty just like I said
16 when I came in here the first. That's all I can
17 tell you. Hopefully, I'll see somebody back
18 again. You know, probably won't be you. What I
19 mean is I'm going to appeal this. I'm going to
20 try to get back. That's what I mean. I don't
21 mean I'm going to see you outside walking around
22 because I wouldn't attempt to, like, threaten you
23 or nothing. What I mean by see again, come back
24 before the Court and try to get it overturned
25 just like what you told Mr. Moyer, you hope that

1 it didn't get reversed by what you just had done
2 earlier. That's what I meant. That's what I
3 meant by that, sir.

4 **THE COURT:** Okay.

5 **MR. BARTON:** With all due respect to you,
6 that's what I mean.

7 **THE COURT:** Oh, that's fine.

8 **MR. BARTON:** Okay.

9 **THE COURT:** 25 years. Good luck to you.

10 (WHEREUPON, the Defendant is escorted from the
11 courtroom at approximately 2:29 p.m.)

12 **THE COURT:** Ms. Ross, for the record, you
13 have discussed his right to appeal?

14 **MS. ROSS:** Yeah, and I'm getting that.

15 **THE COURT:** Okay. You are going to go ahead
16 and file the appeal?

17 **MS. ROSS:** Oh, yeah.

18 **THE COURT:** Okay. All right. I just wanted
19 to know on the record. Good. Thank you. Good
20 job by the way.

21 **MS. ROSS:** Thanks.

22 (WHEREUPON, the proceedings conclude at
23 approximately 2:30 p.m.)

24 (END OF PROCEEDING)

25

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

THE STATE,

v.

BOBBY BARTON, -

DEFENDANT.

) IN THE COURT OF GENERAL SESSIONS

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**DEFENDANT'S REQUEST
FOR JURY INSTRUCTIONS**

INDICTMENT NO. 09-GS-23-10018

OBT STR

Request No. 1:

I charge you, ladies and gentlemen of the jury, that even where the evidence demonstrates a probability of guilt, a probability of guilt is not guilt beyond a reasonable doubt and you must find the defendant not guilty.

See, e.g., Cage v. Louisiana, 111 S.Ct. 328, (1990)

Request No. 2:

The defendant comes into this courtroom presumed to be innocent. No defendant, in any criminal proceeding, has the burden of proving his innocence, which might be impossible to do in any number of cases. However, that presumption of innocence surrounds the defendant like a cloak and is only removed from the defendant if you have been convinced beyond a reasonable doubt on every element of the offense that the defendant is in fact guilty.

See, e.g., Mullaney v. Wilbur, 421 U.S. 684 (1975).

Request No. 3:

The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence, and the defendant has the right under the United States and South Carolina Constitutions not to take the witness stand and testify. The exercise by the defendant of the right not to testify or present evidence should not weigh in the slightest against the defendant and should play no role in your discussions and deliberations. No inference of any kind may be drawn from the failure of the Defendant to testify or to present any other form of evidence. In particular, no presumption or inference of guilt may be drawn from the failure of the defendant to testify or offer evidence.

State v. White, 243 S.C. 238, 243-245, 133 S.E.2d 320 (1963).

Request No. 4:

In order to find the defendant guilty of armed robbery, you must find that the State has proven each of the elements of this crime beyond a reasonable doubt

See, e.g., Mullaney v. Wilbur, 421 U.S. 684 (1975).

✓ Request No. 5:

A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

State v. Johnson, Op. No. 24096 (S.C. Sup.Ct. filed June 13, 1994) (Davis Adv. Sh. No. 14 at 29); State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991), cert. denied, 112 S.Ct. 1282 (1992); T. Ervin, What Does "Beyond a Reasonable Doubt" Really Mean, S.C. Lawyer 32 (July/Aug. 1994).

✓ Request No. 6:

If you have a reasonable doubt as to whether the defendant is guilty, then you must resolve that doubt in favor of the defendant and find him not guilty.

See, e.g., State v. Robinson, 307 S.C. 169, 414 S.E.2d 142 (1992).

 Request No. 7:

In evaluating the reliability of the identification of defendant you must consider the circumstances under which the eyewitness made the observations. In this regard, you may consider:

1. Whether the witness knew the defendant before the crime took place. ✓
2. whether the witness had a good opportunity to see the person. ✓
3. whether the witness seemed as though he was paying careful attention to what was going on.
4. whether any description given by the witness was close to the way the defendant actually looked.
5. how much time had passed between the crime and the first identification by the witness.
6. whether, at the time of the first identification by the witness, the conditions were such that the witness was likely to make a mistake because he was "cued" by the circumstances, for example, was the witness asked to pick out the person he saw from a group of similar people, was the witness asked to pick the defendant from a group of dissimilar persons, or was the witness simply asked if the defendant standing alone was the person involved?

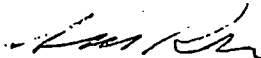
If you are not convinced beyond a reasonable doubt as to the accuracy of the identification and that it was the defendant who committed the crime, you must find defendant not guilty.

See, e.g., State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) (expert testimony on eyewitness testimony admissible); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987); State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982); In the Interest of Jamal Rashee A., 308 S.C. 392, 418 S.E.2d 326 (Ct. App. 1992); United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); United States v. Smith, 653 F.2d 1361, 1364-

(PAGE 249, LINE 23-25. PAGE 250 LINE 1-5)

66 (9th Cir. 1977) (concurring opinion); Federal Judicial Center, Pattern Criminal Jury Instructions 44-45 (1988).

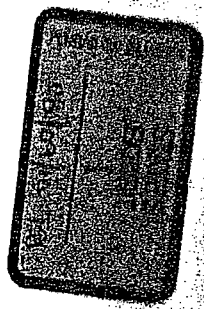
Respectfully submitted,



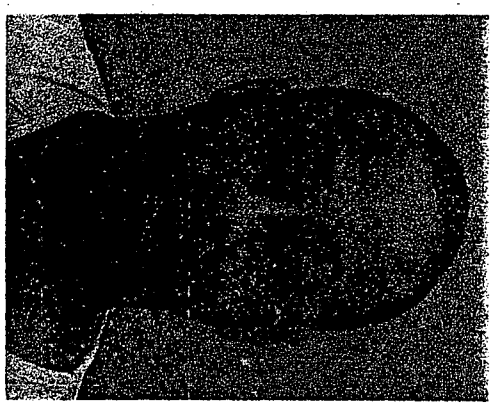
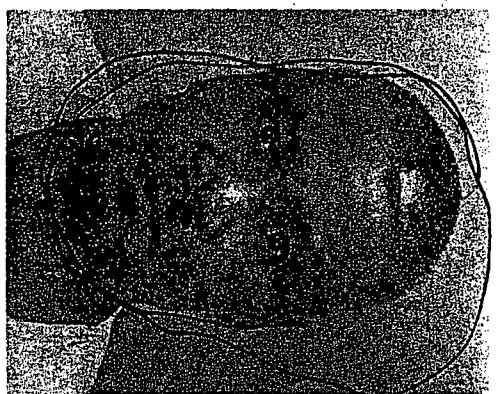
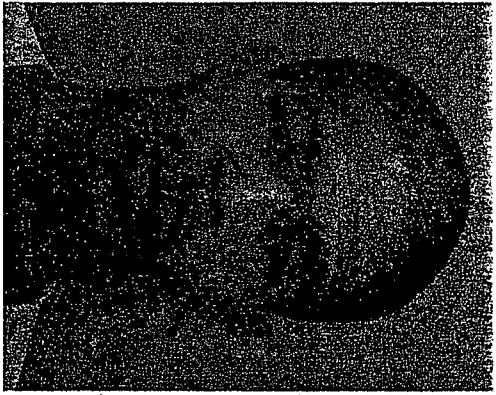
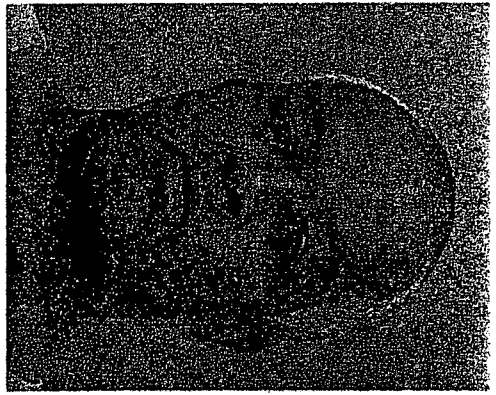
Susannah Ross
Attorney for the Defendant
Greenville County Courthouse
Greenville, S.C. 29601
(864) 467-8522

Greenville, South Carolina
This 2 day of Aug, 2010

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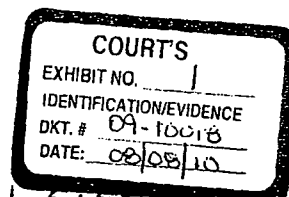


GREENVILLE COUNTY SHERIFF'S OFFICE



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Printed: Friday, January 8, 2010 8:42 AM



STATE OF SOUTH CAROLINA } IN THE GENERAL SESSION COURT
COUNTY OF GREENVILLE } OF THE 13TH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA } 1) ARMED ROBBERY I-478797
VS. } 2) WEAPON DUR. VIO CRIM. I-478798

BOBBY JOE BARTON,
DEFENDANT

FORMAL COMPLAINT
SUSANNAH ROSS, P.D.

COMES NOW THE DEFENDANT BEFORE THE COURT
TO FILE A FORMAL COMPLAINT AGAINST ^{BB. 8/6/10} ~~AGAINST~~ ATT-
ORNEY SUSANNAH ROSS OF THE PUBLIC DEFENDERS
OFFICE FOR "BREACH OF CONFIDENTIALITY" AND
"CONFLICT OF INTEREST". THE PUBLIC DEFENDER IN
THIS CASE HAS DIVULGED CONFIDENTIAL INFORMATION
IN THIS CASE KNOWN ONLY TO HIM AND THE PUBLIC DEFEN-
DER AT A SPECIFIC TIME. THE PUBLIC DEFENDER HAS ALSO
REFUSED TO PUT THE BEST INTEREST OF THE PUBLIC AND THE
CLIENT BUT HAS SOUGHT TO CREATE AN ATMOSPHERE CON-
DUSIVE ONLY TO A PLEA AGREEMENT. THE DEFENDANT IN
THIS CASE HAS FILED A COMPLAINT ALSO WITH "THE
SUPREME COURT OF SC OFFICE OF DISCIPLINARY
COUNSEL" WITH IN-DEPTH INFORMATION OF HER ACTIONS.
I REQUEST THAT SUSANNAH ROSS BE REMOVED FROM
THIS CASE PERMANENTLY AND BE REPLACED WITH
AN "608" OUTSIDE APPOINTMENT DUE TO THE SERIOUS
NESS

OF THE ALLEGATIONS AGAINST THE PUBLIC DEFENDER AND THE OFFICE OF PUBLIC DEFENDER.

THE DEFENDANT IN THIS CASE HAS BEEN INCARCERATED FOR (1) YEAR ON THESE CHARGES. HE ALSO WISHES TO GET AN OUTSIDE APPOINTMENT SOON AS POSSIBLE THAT HIS CASE MAY CONTINUE TO MOVE THROUGH THE COURT SYSTEM WITHOUT MUCH DELAY THROUGH NO-FAULT OF HIS OWN. THE DEFENDANT HUMBLY REQUEST THIS AT STATE EXPENSE BECAUSE HE IS STILL INDIGENT DUE TO NO GAINFUL EMPLOYMENT FOR THE LAST (18) MONTHS.

IT IS WITH MANY PRAYERS AND MUCH HOPE THAT THE DEFENDANT COMPLAINT AND REQUEST WILL BE GRANTED.

I STATE UNDER THE PENALTY OF PERJURY ALL STATEMENTS ARE TRUE.

SINCERELY,

Bobby Joe Barton

CC: CLERK OF COURT

ADM. JUDGE

THE SOLICITOR'S OFFICE

SUSANNAH ROSS, P.D.

BOBBY JOE BARTON

AUGUST 6, 2010

CERTIFICATE-OF-SERVICE

THE HEREBY UNDERSIGNED CERTIFIES
 THAT A TRUE AND EXACT COPY OF A FORMAL
COMPLAINT AGAINST SUSANNAH ROSS & P.D. OFFIC
 HAS BEEN ~~MAILED TO~~ ^{B.B. 8/6/10} SERVE IN OPEN COURT BY HIS
 HAND TO THE JUDGE, CLERK OF COURT & SUSAN ROSS BY
~~THE UNITED STATES POSTAL AUTHORITY~~ ^{T.B. 8/6/10} ON
AUGUST, 9TH DAY, OF 2010, FROM
 THE GREENVILLE COUNTY ~~DETENTION CENTER~~ ^{8/6/10}
 COURTHOUSE.

SINCERELY,

Billy B. B.

SWORN TO AND SUBSCRIBED
 BEFORE ME THIS _____
 DAY OF _____, 20____

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES _____

TRANSCRIPT OF MR.
PEREZ TESTIMONY.

8/10/10

A TRANSCRIPT CANNOT BE
PROVIDED BUT THE TESTIMONY
CAN BE REPLAYED IN ITS
ENTIRETY OR ANY
PORTION THEREOF.

Judge Melk

COURT'S	
EXHIBIT NO.	3
IDENTIFICATION/EVIDENCE	
DKT. #	
DATE:	08/10/10

REDUING ARMED VS.
STRONG ARM ROBBERY.

COURT'S	
EXHIBIT NO.	4
IDENTIFICATION/EVIDENCE	
DKT. #	
DATE:	

WITNESSES

Michael Jarvis

Sheep

Greenville County Sheriffs Office

8/4/2009

DOCKET NO. 2009-GS-23-

LMM

010013

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

February TERM 2009

THE STATE

VS.

BOBBY JOE BARTON

ARREST WARRANT NUMBER

1478797, 1478798

ACTION OF GRAND JURY

TRUE BILL

Wm J. J. J.

For person of FOREMAN GRAND JURY

VERDICT

① GUILTY

② NOT GUILTY

James Cloud

For person of Petit Jury

Date: 8/10/10

Indictment for

0139, 0549

ARMED ROBBERY AND POSSESSION OF A
WEAPON DURING THE COMMISSION OF A
VIOLENT CRIME

VIOLATION § 16-11-0330 and § 16-23-0490

ENTERED
ACCT.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

INDICTMENT FOR
 ARMED ROBBERY AND POSSESSION OF A WEAPON DURING
 THE COMMISSION OF A VIOLENT CRIME

FEB 16 2010

At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

COUNT ONE

ARMED ROBBERY

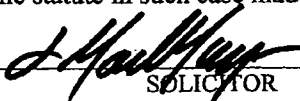
That BOBBY JOE BARTON did in Greenville County, on or about the 25th day of July, 2009, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: Wallet and U. S. Currency from the person or presence of Edwin Perez. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That BOBBY JOE BARTON did in Greenville County, on or about the 25th day of July, 2009, possess or visibly display a knife during the commission or attempted commission of a violent crime, to wit: Armed Robbery. This is in violation of §16-23-0490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

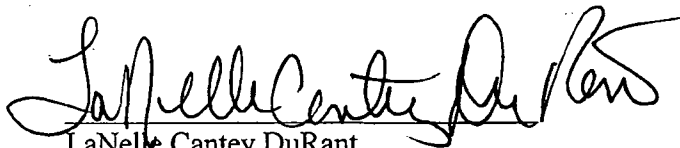

 SOLICITOR

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CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 27th, 2012

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

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JUN 19 2013

STATE OF SOUTH CAROLINA

S.C. Supreme Court

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOBBY J. BARTON,

APPELLANT

APPELLATE CASE NO. 2010-169826

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Barton's motion to suppress the identification via the photo lineup when the lineup was not reliable because the alleged victim was inebriated at the time of the incident, and had seen Barton's photo in a "mug shot" magazine prior to the photo lineup?
2. Did the trial court err in refusing to give Barton's complete Request to Charge #7 on the accuracy of identification?
3. Did the trial court err in giving the jury a second charge on armed robbery at the request of the state just to include the words "or representation of a weapon" when neither the victim nor the co-defendant witness saw the knife allegedly used?
4. Did the trial court err in refusing to relieve Barton's trial attorney and appoint another attorney after Barton argued that his attorney breached his confidentiality by bringing to light at the preliminary hearing that the co-defendant witness, Patricia Rice, had lived with Barton previously?

STATEMENT OF THE CASE

On February 16, 2010, the Greenville County Grand Jury indicted Bobby Joe Barton on the charges of armed robbery (AR) and possession of a weapon during the commission of a violent crime. On August 9 – 10, 2010, Barton proceeded to trial before the Honorable Edward W. Miller and a jury. Barton was represented by Susannah Ross, and the state was represented by L. Mark Moyer, assistant solicitor. The jury found Barton guilty of armed robbery, but found him not guilty of the possession of a weapon during the commission of a violent crime. Judge Miller sentenced Barton to confinement for twenty-five years. Barton's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in denying Barton's motion to suppress the identification via the photo lineup when the lineup was not reliable because the alleged victim was inebriated at the time of the incident, and had seen Barton's photo in a "mug shot" magazine prior to the photo lineup.

On July 25, 2009, Edwin Perez was sitting behind his trailer in the trailer park where he lived with his brothers, but his brothers were inside at this time. He had been drinking beer since he got home from his landscaping job on that Friday. R. 32, ll. 18 – 25; R. 36, ll. 16 – 18; R. 70, ll. 4 – 11; R. 72, ll. 14 – 25; R. 73, ll. 1 – 25; R. 74, ll. 1 – 10. All of a sudden, a man and woman appeared. The man allegedly pushed him down, and held a knife to his throat and took his wallet which contained \$500. Perez did not see the knife but felt it against his throat. R. 75, ll. 1 – 25; R. 76, ll. 1 – 25; R. 77, ll. 1 – 25. He had seen the woman before a few times when she took the path through the trailer park to another neighborhood. He had seen the man maybe twice. R. 78, ll. 1 – 25; R. 79, ll. 1 – 4.

He said it was dark outside as it happened around midnight. However, there were some lights at the entrance of the trailer. R. 35, ll. 21 – 25; R. 36, ll. 1 – 25; R. 92, ll. 3 – 8.

Perez called 911 but hung up because the police were speaking in English. The police could not understand him.¹ The police called back, and talked to his brother who spoke English. His brother interpreted for him. R. 41, ll. 15 – 25; R. 42, ll. 1 – 3; R. 82, l. 1 – 10; R. 79, ll. 5 – 25.

¹ Perez did not speak English and required an interpreter during the trial to translate. R. 32, ll. 18 – 20.

The description Perez gave to the police was that the robber was a black male in his mid-twenties to early thirties. R. 32, ll. 5 – 8; R. 108, ll. 3 – 25; R. 109, ll. 1 – 23. Perez admitted on cross examination during the Neil v. Biggers² pretrial hearing that he was not surprised that the officers described him as “grossly intoxicated” on the night of the incident. R. 42, ll. 8 – 17.

About a week after the incident, on August 3, 2009, Investigator Mike Jarvis of the Greenville County Sheriff’s Office talked with Perez. They rode through the nearby neighborhoods and found the woman who was at the robbery. R. 123, ll. 20 – 25; R. 125, ll. 1 – 25; R. 126, ll. 1 – 25.

The woman was identified as Patricia Rice who had been in a romantic relationship with Barton off and on for ten years. R. 127, ll. 1 – 25; R. 128, ll. 1-2; R. 110, ll. 18 – 25; R. 112, ll. 8 – 23. Rice told the investigators that she was present when the robbery occurred. R. 115, ll. 1 – 25. Rice was arrested and charged with this robbery. The charges were later dismissed. R. 111, ll. 1 – 12. Rice told the investigators on August 3, 2009, that Barton committed this robbery of Perez on July 25, 2009. R. 115, ll. 14 – 25; R. 117, ll. 1 – 25; R. 128, ll. 1 – 20. Barton was arrested the next day on August 4, 2009. R. 128, ll. 21 – 25; R. 129, ll. 1 – 3.

About two weeks after Barton was arrested, Perez found a “mug shot” magazine which contained hundreds of pictures of people who had been arrested. He looked through the magazine and saw Barton’s mug shot. R. 88, ll. 1 – 25; R. 89, ll. 1 – 25; R. 90, ll. 1 – 6. Barton and Rice were the only mug shots for armed robberies in the magazine. R. 106, ll. 2

² Neil v. Biggers, 409 U.S. 188 (1972).

- 25; R. 107, ll. 1 - 3. Perez did not call the police and tell them of the mug shot. R. 96, ll. 16 - 25; R. 97, ll. 1 - 12; R. 98, ll. 15 - 20.

On January 8, 2010, about five months after the robbery, Investigator Tracy King called Perez to come into the sheriff's office and view a photo line up. Six photos were included with Barton in the lower center of the six. The photo used of Barton was the mug shot taken when he was arrested on August 4, 2009. R. 99, ll. 9 - 25; R. 100, ll. 1 - 24. Perez selected the photo of Barton as the person who robbed him. R. 102, ll. 1 - 25; R. 103, ll. 1 - 25; R. 104, ll. 1 - 23.

Investigator King testified that the picture used in the photo line up was the same mug shot that appeared in the "mug shot" magazine. R. 105, ll. 24 - 25; R. 106, ll. 1 - 23; R. 107, ll. 1 - 3; R. 45, l. 1 - 6.

During the Neil v. Biggers hearing, defense counsel called as an expert witness, Dr. Lori Van Wallendael, who was an associate professor of psychology at the University of North Carolina at Chapel Hill. R. 47, ll. 16 - 25. She was qualified as an expert in eyewitness identification. Her specialty was eyewitness memory. R. 48, ll. 1 - 25.

Dr. Van Wallendael testified that the identification by Perez was unreliable. R. 49, ll. 13 - 25; R. 50, ll. 1 - 4. She explained the factors that made the identification unreliable. The first one was that the victim/witness was inebriated at the time of the incident. People who were inebriated did not take in as much information from a scene as someone who was not inebriated, and were more likely to make a false identification. R. 50, ll. 4 - 18.

The second factor was that a weapon was said to be involved which created a greater likelihood of false identification because the person was more focused on the weapon. R. 50, ll. 22 - 25; R. 51, ll. 1 - 10.

The third factor where Perez was able to give a better description of the female co-defendant Rice meant that he was paying less attention to the male than female. R. 52, ll. 1 – 12.

The photo lineup was not reliable because Perez had prior exposure to the mug shot. The fact that the state was not involved on that exposure made the situation worse because there was no controlled circumstance. Also, because Perez had seen the photo before, he may have selected it because it looked familiar due to the prior exposure. R. 52, ll. 13 – 25; R. 53, ll. 1 – 25; R. 54, ll. 1 – 8.

The doctor also said the photo lineup should have been based on the description given by the victim, and not on Barton's physical description. R. 54, ll. 9 – 25; R. 55, ll. 1 – 25.

The doctor said the two most significant factors that made the identification unreliable were the victim's state of intoxication, and the prior exposure to the "mug shot" magazine. R. 56, ll. 1 – 5.

The solicitor objected to the testimony of the expert concerning the prior exposure to the mug shot because there was no state action involved. R. 52, ll. 17 – 25.

Defense counsel argued that the in-court identification should not be allowed because the out-of-court identification was suggestive pursuant to Neil v. Biggers, 409 U.S. 188 (1972). Counsel argued there was state action involved in the identification process. R. 59, ll. 11 – 25.

Counsel argued the second inquiry related to due process and whether there was a substantial likelihood of misidentification. Counsel argued there was a violation of due process whether there was governmental action or not. Counsel argued that the exposure to

the “mug shot” magazine was a violation of due process when Barton was the only man in the magazine with an armed robbery charge, and the state used the same mug shot in the photo lineup that the victim saw in the magazine. R. 60, ll. 1 – 25; R. 61, ll. 1 – 5.

The judge ruled that the “mug shot” magazine was not the result of government action, and was not admitted. He ruled that the photo lineup was appropriate and was admitted. The expert did not testify. R. 61, ll. 6 – 25; R. 62, ll. 1 – 3; R. 2 - 4.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court set out a two prong process to determine if an out-of-court identification was admissible: (1) if the identification process was unduly suggestive and (2) if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, id.; State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003).

An in-court identification of an accused is inadmissible if out-of court identification was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Neil v. Biggers cites five factors to determine reliability: (1) opportunity of witness to view criminal at time of crime (2) witness’ degree of attention (3) accuracy of witness’s prior description of criminal (4) level of certainty by witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers, supra.

In State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), and State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), the South Carolina Supreme Court held that a criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification.

The case of People v. McDonald, 37 Cal. 3d 351 (1984), held that there can be testimony that people who identify can be mistaken as there were factors that jurors would not think about which may influence a person's ability to identify, such as cross-racial identification or the effects on memory of the witness's exposure to suggestions.

In State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991), the Supreme Court held that expert testimony on eyewitness reliability was admissible, where main issue is identity of the perpetrator, sole evidence of identity is eyewitness identification, and identification is not substantially corroborated by evidence giving it independent reliability.

In State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), the Court of Appeals ruled that the pretrial identifications based on media representations of the defendant did not violate the defendant's due process rights because the televised bond hearing and newspaper article were non-governmental sources of the suggestiveness.

Barton's case is distinguished because the suggestiveness came from the mug shot which was taken by the government when Barton was arrested. The "mug shot" magazine had to obtain the mug shot through the state.

In United States v. Holley, 502 F.2d 273 (U.S. Ct App. Fourth Circuit 1974), the Fourth Circuit held that to guard against misidentification, it is not enough that the trial judge be specifically alerted to the detailed factors that enter into the totality of the circumstances; the jury should also be charged. In this case where there was no evidence of identification except of one eyewitness, the Fourth Circuit wrote:

Where the identification testimony was so lacking in positiveness as to strongly suggest the likelihood of irreparable misidentification, the jury should have been specifically instructed to consider the possibility of

misidentification under the specific circumstances revealed by the evidence.

In United States v. Telfaire, 469 F.2d 552 (U.S. Ct App. District of Columbia 1972), the District Court held that in deciding whether to permit a criminal case to go to the jury where the identification rests on the testimony of one witness, trial court should determine whether the totality of the circumstances gives rise to a very substantial likelihood of irreparable misidentification.

In Barton's case, the identification was unduly suggestive and should not have been allowed into evidence.

ARGUMENT

II.

The trial court erred in refusing to give Barton's complete Request to Charge #7 on the accuracy of identification.

In his trial for armed robbery of Perez on July 25, 2009, defense counsel requested a jury charge on identification of Barton by Perez. Counsel said that her Request # 7 addressed identification specifically. The judge said: "Right." R. 134, ll. 10 – 24.

Following jury charges, the judge asked if there any objections to the charges. Defense counsel objected that the judge did not charge points 3 -6 on her Request # 7 regarding identification. She said the judge did not go through these points which related to witness credibility such as whether the witness was paying careful attention. Counsel asked the judge to present those points to the jury. R. 178, ll. 1 – 13.

The judge said he thought he the issues were adequately covered in his charge. The solicitor agreed with the judge. The judge said it was noted for the record. R. 178, ll. 14 – 21.

Defense counsel's Request # 7 provided:

In evaluating the reliability of the identification of the defendant, you must consider the circumstances under which the eyewitness made the observations. In this regard, you may consider:

3. Whether the witness seemed as though he was paying careful attention to what was going on;
4. Whether any description given by the witness was close to the way the defendant actually looked;
5. How much time had passed between the crime and the first identification by the witness;
6. Whether, at the time of the first identification by the witness, the conditions were such that the witness was likely

to make a mistake because he was “cued” by the circumstances. For example, was the witness asked to pick out the person he saw from a group of similar people, was the witness asked to pick out the defendant from a group of dissimilar people, or was witness asked if the defendant standing alone was the person involved.

See Request #7.

The judge gave the following charge:

An issue in this case is the identification of the defendant as the person who committed the crime charged. The state has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt the accuracy of the defendant---excuse me---the accuracy of the identification of the defendant before you may convict him. Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available to view, how far or close the witness was, the lighting conditions and whether the witness had the chance to see or know the person in the past. Once again, I instruct you that the burden of proof on the state extends to every element of the crime charged, and this burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed this offense.

R. 170, ll. 8 – 25; R. 171, ll. 1 – 11.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court’s decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme Court held that in reviewing jury charges for error, the Supreme Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.

The Supreme Court held in State v. Day, 341 S.C. 439, 452, 529 S.E.2d 431 (2000), that the failure to tailor jury instructions to adequately reflect the facts and theories presented by the defendant constituted reversible error. In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Supreme Court reversed and remanded Fuller's conviction of voluntary manslaughter because the Court held that it was reversible error where the trial court failed to charge on the elements of defense which were applicable to the issues raised by the defendant.

The only evidence against Barton were the identification of him by Perez, the victim, and Co-defendant Rice. There was no physical evidence such as DNA. Rice did not see a weapon, and testified that she did not really see anything but saw Barton run. R. 131, ll. 11 – 14; R. 115, ll. 14 – 25; R. 213, ll. 5 – 25. Rice was a biased witness because she was initially charged with the armed robbery. Her charges were dismissed the week before Barton's trial after she spent eleven months in jail on the charges. R. 111, ll. 1 – 12; R. 121, ll. 17 – 25; R. 122, ll. 1 – 25. She was convicted in 2008 for lying to the police about her name. R. 111, ll. 13 – 21.

Therefore, Perez's identification was significant evidence. The jury asked to rehear Perez's testimony. R. 179, ll. 1 – 25; R. 180, ll. 1 – 14. Because his identification was suggestive based on his inebriation at the time, and his prior exposure to the mug shot which was used in the photo lineup, the judge should have given all of the requested jury charge which was broader than the charge he gave. The totality of the circumstances required that the trial judge give a detailed instruction to the jury on the identification.

ARGUMENT

III.

The trial court erred in giving the jury a second charge on armed robbery at the request of the state just to include the words “or representation of a weapon” when neither the victim nor the co-defendant witness saw the knife allegedly used.

After the judge charged the jury, which included the charge on armed robbery and strong armed robbery, the jury requested the definitions of armed robbery and strong armed robbery again. R. 171, ll. 12 – 25; R. 172, ll. 1 – 25; R. 173, ll. 1 – 17; R. 180, ll. 19 – 25. The judge brought the jury to the courtroom and read the charges on armed robbery and strong armed robbery the second time. R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 8.

The solicitor objected because the judge did not include the words “or representation of a weapon” at the beginning of his charge on strong armed robbery when he was describing it as a lesser included of armed robbery. The solicitor argued that the judge did include those specific words when he defined armed robbery, but did not include them in his definition of armed robbery at the beginning of his charge on strong armed robbery. R. 184, ll. 11 – 25; R. 185, ll. 1 – 13.

The judge initially said he thought it was covered but then decided to charge the jury a third time on armed robbery and strong armed robbery. Defense counsel objected to the recharge because she argued that it would only highlight the issue. R. 185, ll. 14 – 25.

The judge then charged the jury the third time on armed robbery and strong armed robbery. R. 186, ll. 1 – 25. Defense counsel objected again arguing that the recharge only highlighted the aspect which was “especially problematic” since the victim did not

understand English, and would not understand if the robber said he was armed with a deadly weapon. R. 187, ll. 1 – 12.

In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme court held that a jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. The Court also held that in reviewing jury charges for error, the Supreme Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Id.

The judge giving the charges on armed robbery and strong armed robbery a second and third time was prejudicial to Barton as it did highlight "representation of a weapon." This had an impact on the jury because the jury found him guilty of armed robbery but not guilty of the possession of a weapon. Without the judge's emphasis on the "representation of a weapon", there is a reasonable probability that the jury would have found him not guilty of armed robbery or may have found him guilty of only strong armed robbery.

All of the judge's three charges on armed robbery contained the words "or the representation of a weapon or alleged, either by action or words, that he was armed." R. 172, ll. 9 – 16; R. 182, ll. 11 – 18; R. 186, ll. 3 – 15. His original charge and second charge on strong armed robbery did not include those words when he said if the jury believed the state did not prove he was armed with a deadly weapon. R. 173, ll. 3 – 7; R. 183, ll. 5 – 10. His third charge read: "if you find that the state has failed to prove that the defendant was armed with a deadly weapon or with the representation of a deadly weapon after having alleged that he was armed." R. 186, ll. 16 – 25.

On the third charge, the judge added a sentence which read:

So, just remember it's not, uh, just a deadly weapon, but it could also be a representation of a deadly weapon once the person has alleged he was armed.

R. 186, ll. 21 – 24.

ARGUMENT

IV.

The trial court erred in refusing to relieve Barton's trial attorney and appoint another attorney after Barton argued that his attorney breached his confidentiality by bringing to light at the preliminary hearing that the co-defendant witness, Patricia Rice, had lived with Barton previously.

On August 9, 2010, Barton filed a document with the clerk of court entitled: "Formal Complaint." In that document, Barton requested that his attorney be relieved and outside counsel be appointed to represent him. Court's Exhibit 1.

At the beginning of his trial, Barton's attorney told the court that there was an issue with hybrid representation, and her client, Bobby Barton, wanted to go forward with his motion at that time. R. 6, ll. 8 – 12. Barton presented a written copy of his motion to the judge which was made a Court's Exhibit. R. 6, ll. 13 – 25.

The judge told Barton after reading the motion that Attorney Ross was a competent attorney and zealous advocate who was appointed to represent him. The judge denied Barton's motion. R. 7, ll. 1 – 19.

Barton asked to speak which the judge allowed. Barton explained to the judge that his attorney had breached his confidentiality which was information that only the two of them knew at the time she divulged. R. 7, ll. 24 – 25; R. 8, ll. 1 – 16. He argued that his co-defendant was a woman whom he had lived with two years. The co-defendant acted as though he was a stranger that she had just met who was always trying to be with her. He said this was not true. He told his attorney this and gave her the addresses where they had lived. R. 9, ll. 1 – 25.

His attorney breached his confidentiality when she told Investigator Jarvis at the Preliminary Hearing about this, and asked if he knew this. That removed the element of surprise which Barton wanted to use in the trial court. He told her this in the “strictest of confidence.” R. 10, ll. 1 – 22.

His attorney then told the court that the information was told in the context of a motion to reconsider the bond. She argued that she was not given this information in confidence. She said the main problem was hybrid representation. She said Barton had filed numerous motions on his own. R. 10, ll. 24 – 25; R. 11, ll. 1 – 25; R. 12, ll. 1 – 25; R. 13, ll. 1 – 11. The judge denied Barton’s motion for a different attorney. The judge said the case was going forward. When he asked if Barton wanted his attorney to continue to represent him or did he want to represent himself, Barton said he did not want attorney Ross to represent him. R. 13, ll. 12 – 25; R. 14, ll. 1 – 23. The judge asked Attorney Ross to continue to represent Barton which she agreed to do. R. 14, ll. 24 – 25; R. 15, ll. 1 – 7.

The solicitor told the court at that point that he knew the information that Barton said was breached, because the solicitor had learned it through independent means. He said it was not based on anything Attorney Ross said. The solicitor said that his investigator learned this from talking to the co-defendant. R. 15, ll. 6 – 24.

Barton argued to the court that the solicitor did not know this information when his attorney disclosed it on November 12 as Investigator Jarvis said at the time that he did not know that. The judge denied Barton’s motion again. R. 16, ll. 1 – 25.

In State v. Justus, 392 S.C. 416, 709 S.E.2d 668 (2011), the Supreme Court held that a motion to relieve counsel was addressed to the discretion of the trial judge and would not be disturbed absent an abuse of discretion. The movant seeking to relieve counsel bears the

burden to show satisfactory cause for removal. State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007).

Rule 1.6(a), RPC, Rule 407, SCACR, provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). Paragraph (b) provides that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.

In United States v. Mullen, 32 F.3d 891 (U.S. Ct App. Fourth Circuit 1994), the Fourth Circuit held that in evaluating whether the trial court abused its discretion in denying defendant's motion for substitution of counsel, the appellate court considers three factors: timeliness of the motion; adequacy of the trial court's inquiry into the defendant's complaint; and the attorney-client conflict whether it was so great that it resulted in a total lack of communication preventing an adequate defense.

In Barton's case, these three factors were met. Barton's Motion to Substitute counsel was filed timely (See Court's Exhibit 1). The trial court only gave Barton's complaint a cursory review without going into the details of the complaint. A breach of confidentiality, as Barton explained, is a violation of the Rules of Professional Responsibility. As Barton explained, trust no longer existed. A breakdown in communication occurred.

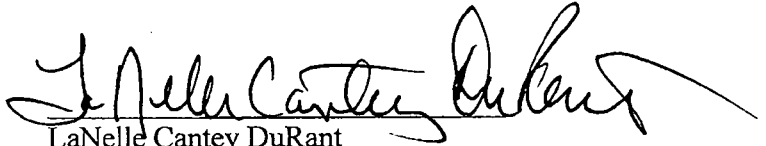
Barton disclosed the information concerning his co-defendant in confidence to his attorney. He did not give her permission to divulge or use this information. Barton did not need to tell her that it was in confidence because information he related to her should be

considered in confidence. The attorney needed to seek consent from Barton to divulge anything he told her.

CONCLUSION

Based on the above, the conviction and sentence of the trial court should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written in a cursive style.

LaNelle Cantey DuRant
Appellate Defender

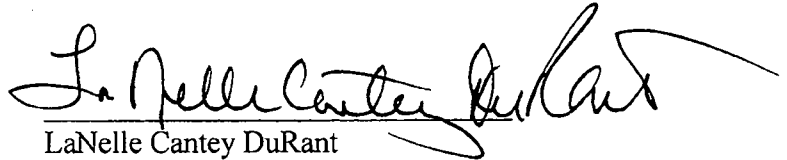
ATTORNEY FOR APPELLANT

This 16th day of October, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 16, 2012

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

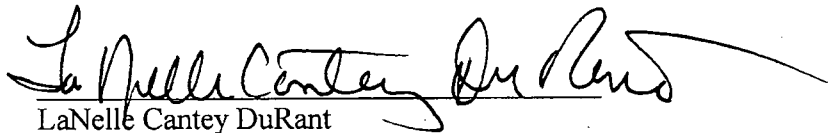
V.

BOBBY J. BARTON,

APPELLANT

CERTIFICATE OF SERVICE

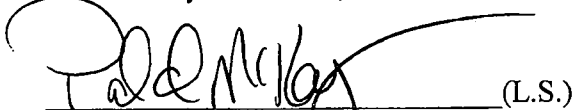
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of October, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of October, 2012.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2010169826

The State,

Respondent,

vs.

Bobby J. Barton,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in denying Appellant's motion to suppress the identification because the discovery by the victim of Appellant's picture in a "mug shot" magazine was not State action and did not warrant suppression.
- II. The trial court properly charged the jury on the law of identification and the charge was complete when viewed as a whole.
- III. The trial court did not err in giving the jury a correct and complete charge on the law of armed robbery and the lesser included offense of strong armed robbery.
- IV. The trial court did not err in denying Appellant's motion to relieve counsel and appoint substitute counsel.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

- I. The trial court did not err in denying Appellant's motion to suppress the identification because the discovery by the victim of Appellant's picture in a "mug shot" magazine was not State action and did not warrant suppression.

Appellant contends the trial court erred in denying his motion to suppress identification by the victim. He asserts the identification was the result of an unduly suggestive procedure because the victim saw Appellant's picture in a "mug shot" magazine prior to his identification of Appellant in a six-person photographic lineup. The procedure actually used by law enforcement was not unduly suggestive and the exposure of the victim to the "mug shot" magazine was not the result of State action. As a result, the trial court properly admitted the victim's identification of Appellant.

In criminal cases, the appellate court sits to review errors of law only. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (citing State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct.App.1993)).

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of

irreparable misidentification.” Liverman, 398 S.C. at ___, 727 S.E.2d at 425-426. Due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. See Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977); see also, Perry v. New Hampshire, 132 S.Ct. 716, 718 (2012).

The United States Supreme Court recently discussed the need for a pretrial determination of an identifying witness’s reliability in a setting in which police action played no role in the suggestive nature of the identification. Perry, 132 S.Ct. 716. In Perry, the defendant was standing beside an officer in the parking lot when he was spontaneously identified by a witness from a distance. The Court explained:

We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Perry, 132 S.Ct. at 720-721. The Court continued: “A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. . . . This deterrence rationale is inapposite in cases . . . in which the police engaged in no improper conduct.” Id. at 726 (citing Manson, 432 U.S. at 112). Finally, the Court holds: “The fallibility of eyewitness evidence does not, without the taint of

improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.” Id. at 728.

This Court considered a similar situation in State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000). In that case, one witness identified the defendant from news footage of his post-arrest bond hearing and the other from a mug shot in a newspaper article the morning after the robbery. This Court found, even given the highly suggestive impact of the media influence, the trial court properly allowed the identifications into evidence because neither was the result of a suggestive procedure used by the State. Id. at 612-613, 527 S.E.2d at 392-393.

This Court, just like the Supreme Court in Perry, found no deterrent effect from excluding identifications in which the influence or suggestive nature arose from non-governmental sources. Id. at 614, 527 S.E.2d at 393 (citing State v. Brown, 528 N.E.2d 523, 532 (Ohio 1988) (“The rationale for excluding a tainted pretrial identification is to protect the defendant from misconduct by the state. . . . In the facts before us, there was no state action. Hence, Manson is inapplicable here. The alleged suggestiveness of the identification, therefore, goes to weight and reliability of the testimony rather than admissibility. Moreover, any prejudicial effect of the testimony could have been cured by effective cross-examination. The testimony was properly admitted.”)).

In the instant case, as in Perry and Tisdale, any suggestive influence in the pre-trial out of court identification arose from a non-governmental source. Appellant relies solely on the “mug shot” magazine in order to argue the suggestive nature of the identification. The victim found the magazine and began flipping through it when he identified Appellant as the person who robbed him. (T.62-63; 123-124; R. 39-40; 88-89).

He found the magazine several months before Investigator King called the victim to the sheriff's office to look at a photographic line-up. (T.67-68; 124; R. 44-45; 89). The only State involvement was presenting the victim a six person photographic lineup, in which the victim correctly identified Appellant.¹ (T.41-48; R. 18-25).

The magazine was not the result of State action, just like the mug shot appearing in the newspaper in Tisdale. No action of the State induced, elicited, or encouraged the identification of Appellant by the victim either in the magazine or at the photographic line-up. As a result, any suggestiveness created by the photograph appearing in the magazine inures to the weight and reliability of the identification, a consideration for the jury, and not to its admissibility to be determined by the trial judge. Appellant had full opportunity to cross-examine the victim and brought out all the information about his prior identification of Appellant through the magazine. (T.64-69; 103-104; 125-131; R. 41-46; 68-69; 90-96). The jury determined the identification was reliable and the State had proven beyond a reasonable doubt Appellant's identity as the robber.

Further, the State asserts the "mug shot" magazine is not nearly as suggestive as the identifications in Perry and Tisdale. In both those cases, the defendant was the sole person subject to identification. In this case, Appellant's picture was just one picture among hundreds in the magazine. (T.123-124; R. 88-89). Further, while the magazine identified their name and crime, the victim testified he did not know Appellant's names and he could not read the crimes charged. (T.68; 124-125; R. 45; 89-90). As a result, he identified Appellant out of the hundreds of pictures in the magazine based solely on the picture identification. If anything, his ability to identify Appellant amongst hundreds of

¹ Appellant does not argue the six-person photographic lineup was unduly suggestive. The line-up, however, is the only source of State action regarding the pre-trial out of court identification by the victim.

photographs in the magazine lends credibility to his subsequent identification of Appellant in the officer created photographic line-up.

Relying on Tisdale and further supported by the United States Supreme Court opinion in Perry, the trial court properly admitted the victim's identification of Appellant and allowed the jury to pass on its ultimate weight and reliability.

II. The trial court properly charged the jury on the law of identification and the charge was complete when viewed as a whole.

Appellant maintains the trial court erred in failing to charge several specific requests to charge related to the victim's identification of Appellant. He maintains the trial court's charge was insufficient regarding the jury's consideration of the identification. The charge, when viewed as a whole, charged the appropriate law in South Carolina and more than adequately informed the jury of their responsibility in considering the identification of Appellant.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted).

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible

error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

In U.S. v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), the Court recommended "that trial courts include, as a matter of routine, an identification instruction" and provided a model identification instruction. See Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "The model instruction, which emphasized that the State had to prove the accuracy of the identification of the defendant beyond a reasonable doubt, 'was designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification.'" Speaks, 377 S.C. at 399, 660 S.E.2d at 514 (citing State v. Jones, 344 S.C. 48, 59, 543 S.E.2d 541, 547 (2001)). Further, In State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992), the South Carolina Supreme Court "admonish[ed] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state."

The instant case, however, is not a one witness identification case as Patricia Rice, who was present at the time of the robbery, also identified Appellant as the person who committed the robbery. In similar cases, the South Carolina Supreme Court has found the Telfaire instruction unnecessary and even a comment on the facts of the case, which is prohibited under the South Carolina Constitution. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see also, State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980) (finding under the

circumstances of that case the Telfaire charge would be a comment on the facts and the charge given "adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt; therefore, no prejudice resulted to defendant from the failure to give the requested instruction."); State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975) (finding where two individuals, including the wife driving the vehicle from which the defendant fired fatal shots, identified the defendant, the Telfaire instruction was not necessary because the court's instruction adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (finding trial court did not err in refusing to give Telfaire charge because it would amount to charge on the facts of the case and the charge given adequately informed the jury of the need to find the testimony identified the defendant as the offender beyond a reasonable doubt).

Appellant sought a charge even more detailed than the Telfaire charge.

Specifically, he asked the court to charge:

1. Whether the witness knew the defendant before the crime took place.
2. Whether the witness had a good opportunity to see the person.
3. Whether the witness seemed as though he was paying careful attention to what was going on.
4. Whether any description given by the witness was close to the way the defendant actually looked.
5. How much time had passed between the crime and the first identification by the witness.
6. Whether, at the time of the first identification by the witness, the conditions were such that the witness was likely to make a mistake because he was "cued" by the circumstances, for example, was the witness asked to pick out the person he saw from a group of similar people, was the witness asked to pick the defendant from a group of

dissimilar persons, or was the witness simply asked if the defendant standing alone was the person involved?

(Defense Counsel's Request 7; R. 194). Appellant acknowledges the court gave the first two portions of the requested charge. It is the last four Appellant contends should have been given. The charges, especially number 6, are an impermissible comment on the specific facts of this case and are unnecessary to convey to the jury the importance of finding the identification was made beyond a reasonable doubt.

The charge given in the instant case, when viewed as a whole, more than adequately informed the jury of its role in determining the reliability and weight to be afforded the victim's identification of Appellant. The trial court informed the jury of their function in determining the credibility of witnesses; including their ability to believe or reject any portion of the testimony, and the fact they may consider whether the witness has an interest in the result of the trial or is prejudiced for or against the defendant. (T.247; R. 168). Further, the court provided a standard reasonable doubt charge indicating the State's burden of proving "each and every element" beyond a reasonable doubt, and properly defining reasonable doubt. (T.248-249; R. 169-170).

The trial court then specifically instructed the jury regarding the issue of the identification of Appellant. The court charged:

A sign -- an issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt the accuracy of the Defendant -- excuse me -- the accuracy of the identification of the Defendant before you may convict him. Identification testimony is an expression or belief or impression by -- expression of belief or impression by a witness. You must determine the accuracy of the identification of the Defendant. You must

consider the believability of each identification witness in the same way as any other witness.

You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available to view, how far or close the witness was, the lighting conditions and whether the witness had the chance to see or know the person in the past. Once again, I instruct you that the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the person who committed this offense or these offenses.

(T.249-250; R. 170-171). The instructions given in this case adequately informed the jury of its role as arbiter of reliability and whether the State met its burden of demonstrating Appellant's identity as the robber beyond a reasonable doubt. The trial court, therefore, did not err in refusing to give the remainder of Appellant's requested charge.

III. The trial court did not err in giving the jury a correct and complete charge on the law of armed robbery and the lesser included offense of strong armed robbery.

Appellant contends the trial court erred in providing the jury a corrected statement of the law which he asserts highlights the fact armed robbery may be proven where an individual uses a representation of a weapon. The trial court provided the jury with a complete and correct statement of the law as he is required.

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 478-79, 697 S.E.2d 578, 583 (2010).

In this case, the court was required to properly charge the jury regarding the law of armed robbery and common law robbery. Armed robbery occurs when a "person . . . commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. S.C. Code Ann. § 16-11-330 (2003) (emphasis added). The jury may, therefore, convict Appellant or armed robbery if it finds he committed the robbery while armed with a deadly weapon, or if Appellant represented he was and the victim believed it to be a deadly weapon. Only if the jury finds Appellant did not use a weapon and Appellant did not allege he was using a representation of a weapon then the jury should consider the lesser included

offense of robbery. "Included in armed robbery is the lesser included offense of robbery, which is defined as 'the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'" State v. Mitchell, 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009).

The trial court properly charged the jury on the definition and elements of armed robbery. Explaining in order to convict Appellant of armed robbery, the State must prove "beyond a reasonable doubt that the Defendant was armed with a deadly weapon during the robbery or alleged, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." (T. 261; R. 182). The court then defined a deadly weapon. The trial court then explained: "Now, if you find that the State has failed to prove that the Defendant was armed with a deadly weapon, you may then consider whether the State has proved beyond a reasonable doubt that the Defendant committed robbery, which is also known as strong arm robbery." (T.262; R. 183). The court then defined robbery for the jury.

The court, however, failed to instruct the jury that the only way to consider the lesser included offense of robbery or strong arm robbery, was for the jury also to find the State failed to prove Appellant did not allege he was armed while using a representation of a deadly weapon or an object the victim reasonably believed to be a weapon. (T.262; R. 183). The State correctly pointed out the court's failure to charge the jury must find the State failed to prove both possible means of demonstrating armed robbery before considering the lesser included offense. (T.263-264; R. 184-185).

The court then provided the jury with a correct charge on the law of armed robbery and the lesser included offense of robbery. The court properly defined the elements of armed robbery. Then the court correctly explained what the jury had to find in order to consider the lesser included offense. Specifically the judge charged: If you find that the State has failed to prove that the Defendant was armed with a deadly weapon or with a representation of a deadly weapon after having alleged that he was armed, then you may consider whether or not, uh, he is guilty of Strong Arm Robbery." (T.265; R. 186).

The trial court merely gave a correct, and complete, statement of the law as he is obligated. Appellant cannot be prejudiced by the trial court's charge when the charge is entirely correct based on the relevant law on armed robbery and the lesser included offense of robbery or strong arm robbery.

IV. The trial court did not err in denying Appellant's motion to relieve counsel and appoint substitute counsel.

Appellant contends the trial court erred in denying his motion to relieve his counsel and appoint new counsel based on counsel's alleged disclosing a confidentiality. Counsel did not disclose any confidential information, did not believe the information was provided to her in confidence, and used the information at a preliminary hearing to benefit Appellant. As a result, there was evidence supporting the trial court's denial of Appellant's motion to relieve counsel.

An accused has the right to the assistance of counsel. U.S. Const. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). "[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Justus, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011); State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). Appellant bears the burden to show satisfactory cause for removal. State v. Graddick, 345 S.C. 383, 386, 548 S.E.2d 210, 211 (2001).

Appellant filed his motion to relieve counsel on August 9, the first date of trial. The motion was dated August 6. Counsel received notice of trial nearly two weeks before and indicated she gave Appellant notice his case had been called. Appellant, therefore, waited until right as trial was beginning to move to relieve his counsel. (T.6-7; Court's Exhibit 1; R. 6-7; 196).

Appellant maintained his counsel breached confidentiality by disclosing information he divulged to her for use as a surprise at trial. He alleges he told his counsel about his relationship with the woman present with him at the robbery. He maintained he

told counsel they lived together and she was "an ex-live-in common law wife." He asserted he gave counsel the information so she could "make a file" and "use [the information] as an element of surprise in this court." (T.9-10; R. 9-10).

Counsel testified she was not given the information in confidence. She presented the information to an investigator to get him to look in that direction to determine if there was more there than originally determined. (T.11; 11). She maintained the real issue between her and Appellant was his desire to file motions and make arguments as a form of hybrid representation which is not allowed. (T.11-13; R. 11-13). See Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002)(counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client) and Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)(no right to hybrid representation).

Most significantly, Patricia Rice, the woman with him at the robbery was testifying on behalf of the State as a witness against Appellant. The State certainly would know this information from her, and the solicitor even put on the record the fact he knew the two had lived together. As a result, Appellant's information would not have been a surprise at trial. He also specifically indicated he received the information from the Rice, his witness, and not opposing counsel. (T.15; R. 15).

Appellant failed to provide a sufficient basis to warrant removal of his counsel and the trial judge certainly did not abuse his discretion in denying Appellant's motion, especially in light of the solicitor's ability to learn the information directly from the State's own witness.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

October 4, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2010169826

The State,

Respondent,

vs.

Bobby J. Barton,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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October 4, 2012

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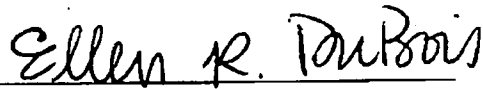
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 4th day of October, 2012.


ELLEN R. DuBOIS
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